

Foreign Ownership Surcharge

Foreign persons (which includes natural persons and corporations) or foreign trusts that acquire an interest in residential land in South Australia are required to pay a foreign ownership surcharge (the “surcharge”) of 7% of the value of the interest in residential land.

The surcharge applies to:

- instruments liable to duty (including a statement under Section 71E); and
- in the case of an acquisition under Part 4, transactions liable to duty;

entered into on or after 1 January 2018.

The surcharge payable is in addition to the duty that is otherwise payable on an acquisition of an interest in land.

Section and Part references relate to the [Stamp Duties Act 1923](#) (the “Act”), unless otherwise specified

An 'acquisition' refers to a conveyance, transfer or acquisition of an interest or, in the case of an acquisition under Part 4, a notional acquisition of an interest in residential land.

When does the surcharge apply from?

The surcharge only applies to:

- dutiable instruments executed, or taken to have been executed; and
- in the case of an acquisition under Part 4, transactions entered into;

on or after 1 January 2018.

As such, dutiable instruments executed or taken to have been executed, or in the case of an acquisition under Part 4, transactions entered into, prior to 1 January 2018 are not liable to the surcharge.

Example

On 20 December 2017, Peter, a foreign person, enters into a contract for the purchase of residential land. A Transfer is subsequently executed on 19 January 2018.

Peter is liable to pay the surcharge on an acquisition of an interest in residential land as the Transfer, being the dutiable instrument, is executed after 1 January 2018.

What acquisitions are liable for the surcharge?

The surcharge applies to acquisitions in an interest in residential land.

The most common examples of an acquisition of an interest in residential land are:

- a purchase of residential land or part of residential land; and
- acquiring or increasing a prescribed interest in a land holding entity, being a company or unit trust scheme, which holds residential land.

In addition, the granting of an option to acquire land, and an assignment which assigns a named purchaser's interest in a contract for the sale of land to a transferee, also give rise to an acquisition of an interest in residential land.

However, if the interest in land acquired by a foreign person or trust is not liable to duty, the acquisition is also not liable to the surcharge.

Example

The will of Andrew provides for the transfer of residential land to his sister, Beatrice, a foreign person. As a transfer of the residential land to Beatrice pursuant to the will is not liable to duty, a surcharge would not be payable.

Are acquisitions that are exempt from duty still liable to the surcharge?

The surcharge only applies to acquisitions of an interest in residential land that are liable to stamp duty.

What is residential land?

Land is taken to be residential land if the Commissioner of State Taxation (the "Commissioner"), after taking into account information provided by the Valuer-General, determines that:

- it is being predominantly used for residential purposes; or
- although the land is not being used for any particular purpose at the relevant time the land should be taken to be used for residential purposes due to improvements that are residential in character having been made to the land; or
- the land is vacant, or vacant with only minor improvements, that the land is within a zone established under the planning and development law of this State that envisages the use, or potential use, of the land as residential, and

that the land should be taken to be used for residential purposes due to that zoning (subject to the qualification that if the zoning of the land indicates that the land could, in a manner consistent with the planning and development law, be used for some other purpose (other than for primary production) then the vacant land will not be taken to be used for residential purposes).

The date that is relevant to a determination as to whether land is residential land is:

- the date of the relevant instrument; or
- in the case of an acquisition under Part 4, the date of the relevant transaction.

For further information regarding whether land is taken to be used for residential purposes, please refer to [Information Circular No. 103](#).

Is residential land used for a commercial purpose liable to duty and the surcharge?

Where land constitutes residential land but is nonetheless used for a commercial purpose, [Information Circular No. 103](#) states:

“A further exception is in relation to land which although coded as residential by the Valuer-General will nevertheless be considered by the Commissioner to be commercial in nature. This treatment will be consistent with the Local Government zoning of the land. Land uses that fall into this category are Hostels, Hotels, Motels, Serviced Apartments and short term unit accommodation.”

The land referred to above will not be considered to be residential land.

However, the exception discussed in [Information Circular No. 103](#) does not extend to Retirement Villages, Aged Care Facilities and other residential premises where the accommodation can best be described as 'long term accommodation'.

Residential land used for the commercial purpose of providing long term accommodation is not considered to be qualifying land. Accordingly, where such land is acquired by a foreign person or trust, the surcharge will apply.

Who is a foreign person or trust?

The surcharge applies to 'foreign persons' (which includes natural persons and corporations) and 'foreign trusts'.

Foreign natural person

A foreign natural person is any individual who is not

- an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cwlth);

- the holder of a permanent visa within the meaning of Section 30(1) of the *Migration Act 1958* (Cwlth); or
- a New Zealand citizen who is the holder of a special category visa within the meaning of Section 32(1) of the *Migration Act 1958* (Cwlth).

Example

Sam is a dual national of Australia and another country. As Sam is an Australian citizen, Sam is not a foreign person.

Example

Jamie holds a permanent visa within the meaning of Section 30(1) of the Migration Act 1958 (Cwlth). As such, Jamie is not a foreign person.

Example

Chris is a New Zealand citizen, but does not hold a special category visa within the meaning of Section 32(1) of the Migration Act 1958 (Cwlth). As such, Chris is a foreign person and is liable to pay the surcharge on an acquisition of an interest in residential land.

Foreign Corporation

A corporation is foreign where it is either:

- incorporated in a jurisdiction that is not an Australian jurisdiction; or
- a person who is a foreign person or a trustee for a foreign trust, or a number of such persons in combination:
 - hold(s) 50% or more of the corporation's shares; or
 - is or are entitled to cast, or control the casting of, 50% or more of the maximum number of votes at a general meeting of the corporation.

Example

Andrew and Beatrice are foreign persons who separately hold 25% each of Company Pty Ltd's shares (50% in total). Company Pty Ltd is therefore a foreign person and is liable to pay a surcharge on an acquisition of an interest in residential land.

Foreign Trust with fixed beneficial interests

Where the beneficial interests of a trust are fixed, a trust will be a foreign trust where a beneficial interest of 50% or more of the capital of the trust property is held by one or more foreign persons.

Example

Sam, a foreign person, holds 50% of the units in a unit trust which gives them a beneficial interest of 50% of the capital of the trust's property. The unit trust is therefore a foreign trust and is liable to pay a surcharge on an acquisition of an interest in residential land.

Example

Dale, a foreign person, is the sole member of a superannuation fund. As Dale has a beneficial interest of 50% or more of the capital of the trust property (i.e. 100%), the superannuation fund is therefore a foreign trust and is liable to pay a surcharge on an acquisition of an interest in residential land.

Foreign Trusts that are discretionary trusts

A discretionary trust means an arrangement, however made, under which a person holds property, and the beneficial interest in all or any part of that property may be vested in a person (in the Act, referred to as an object of the discretionary trust) on the exercise of a discretion, whether subject to any other contingency or not and whether the exercise of the discretion is obligatory or optional.

A discretionary trust will be a foreign trust where one or more of the following is a foreign person:

- a trustee;
- a person who has the power to appoint under the trust;
- an identified object under the trust; and
- a person who takes capital of the trust property in default.

Example

The deed of the A&A Trust, a discretionary trust, provides that Alex, a foreign person, is a trustee. His wife Andrea, a joint trustee of the trust, is not a foreign person.

As a foreign person, Alex, is a trustee of the discretionary trust, the discretionary trust is a foreign trust and the trust would be liable to pay a surcharge on an acquisition of an interest in residential land.

Examples of a 'power to appoint under the trust' include the power to appoint property, income, a new trustee and a person to be a beneficiary.

Example

The deed of the B&B Trust, a discretionary trust, expressly names Bettina, a foreign person, as a person who has a power under the trust to appoint the trustee. Her husband Bruce, who is also expressly named a person who has a power under the trust to appoint property of the trust, is not a foreign person.

As a foreign person, Bettina, has a power to appoint under the trust, the discretionary trust is a foreign trust and the trust would be liable to pay a surcharge

on an acquisition of an interest in residential land.

A person who is an identified object under the trust must be identified in the trust deed by name. The term 'identified as an object' is not a blanket reference to a class or range of beneficiaries under a discretionary trust deed who are not identified by name.

Example

Courtney is expressly named as an identified object of a discretionary trust and is not a foreign person.

Her husband, Colin, is a foreign person, but is not expressly named as an identified object of the trust.

As Colin is not an identified object of trust, the trust is not a foreign trust.

This is the case even if the trust deed includes as objects a class or range of beneficiaries that Colin is a part of e.g. 'the spouse of Courtney'.

Example

The deed of the ABC Trust, a discretionary trust, expressly names Dom, a foreign person, as an identified object under the trust. His wife, Donna, a further expressly named identified object under the trust, is not a foreign person.

As a foreign person, Dom, is an identified object under the trust, the discretionary trust is a foreign trust and the trust would be liable to pay a surcharge on an acquisition of an interest in residential land.

Example

The deed of the ABC Trust, a discretionary trust, expressly names two persons (e.g. a married or de facto couple) as identified objects under the trust, one being a foreign person and the other not being a foreign person.

As one of the identified objects under the trust is a foreign person, the discretionary trust is a foreign trust and the trust would be liable to pay a surcharge on an acquisition of an interest in residential land.

Similarly, a person who takes capital of the trust property in default must be identified in the trust deed by name. The term 'a person who takes capital of the trust property in default' does not extend to persons who are not identified by name in the trust deed but who may take capital of the trust property in default at a later time.

Examples of taking capital of the trust property in default include taking capital of the trust property in default of appointment (i) at certain or regular times as may be required by a trust deed and (ii) prior to the ultimate vesting of the trust.

Example

The deed of the E&E Family Trust, a discretionary trust, expressly names Evan, a foreign person, as a person who takes capital of the trust property in default at certain or regular times as required by the trust deed. His wife Ella, a person expressly named who takes capital of the trust property in default of appointment prior to the ultimate vesting of the trust, is not a foreign person.

As a foreign person, Evan, is a person who takes capital of the trust property in default, the discretionary trust is a foreign trust and the trust would be liable to pay a surcharge on an acquisition of an interest in residential land.

When does a person hold property?

A person holds property (including a security of a corporation) if the person:

- is registered as the holder;
- is beneficially entitled to the property; or
- controls the exercise of rights attached to the property.

When does the surcharge apply and to what to extent does it apply?

The surcharge applies where:

- residential land;
- a part of residential land; or
- an interest in residential land is acquired.

The surcharge of 7% is payable only to the extent of the value of the interest acquired in the residential land.

Example

N & O Family Trust, a foreign trust, acquires a 20% interest in residential land.

The market value of the interest acquired is \$100 000, being 20% of the total market value of \$500 000.

The surcharge amount payable is \$7000, being 7% of the 20% interest acquired, valued at \$100 000.

Joint tenants are taken to be tenants in common in equal shares.

Example

Jamie and Drew acquire residential land as joint tenants. Jamie is a foreign person and Drew is not.

As Jamie is a foreign person and has acquired a 50% interest in residential land, a surcharge is payable on the acquisition of Jamie's 50% interest.

How is the surcharge calculated?

The surcharge is calculated based on the value of the interest in residential land, being the value used for duty purposes. The surcharge is in addition to any duty payable.

Example

If Peter, a foreign person, acquires residential land valued at \$600 000, the total duty payable is as follows.

Stamp Duty	\$26 830
Surcharge (7% of \$600 000)	\$42 000
TOTAL PAYABLE	\$68 830

If Peter, a foreign person, instead acquires a 50% (as opposed to 100%) interest in residential land valued at \$600 000, such that the 50% interest is valued at \$300 000, the total duty payable is as follows.

Stamp Duty	\$11 330
Surcharge (7% of \$300 000)	\$21 000
TOTAL PAYABLE	\$32 330

Is a foreign entity, which is a member of a group that is liable to land holder duty under Part 4, also liable for the surcharge?

For the purposes of the land holder provisions under Part 4, a 'foreign entity' means a foreign person or a foreign trust.

In addition to the group being liable to land holder duty under Part 4, a foreign entity that is a member of a group that notionally acquires an interest in residential land is liable to pay a surcharge on the value of the interest notionally acquired by the foreign entity.

Example

Frank Pty Ltd, Richard Pty Ltd and Ronald Pty Ltd, as a group, acquire 100% (33.33% each) of the shares in a land holding entity. Frank Pty Ltd is a foreign entity and Richard Pty Ltd and Ronald Pty Ltd are not foreign entities.

In addition to the land holder duty payable by the group on the 100% acquisition of the land holding entity, Frank Pty Ltd is liable to a surcharge on 33.33% of the land value.

Does the surcharge apply to a Section 71E Statement?

The surcharge may apply to a Section 71E Statement.

Section 71E relevantly applies to transactions which result in a change of ownership in residential land where the transaction is not effected (or not wholly effected) by an instrument on which duty is chargeable, but had it been so effected by an instrument, the instrument would be chargeable with duty. When such a transaction occurs, a statement must be lodged and duty is payable on the statement as if it were a conveyance effecting the transaction to which it relates.

Example

Greta, a foreign person, holds residential land. Greta subsequently declares that she holds the residential land on trust for a discretionary trust of which she is an identified object. No written declaration of trust, transfer or other instrument liable to duty is effected.

As such, the trust is a foreign trust and an interest in residential land is acquired by a foreign trust. In the absence of any other instrument, a Section 71E statement is required and both duty and the surcharge are payable.

Will any surcharge paid be refunded where a person or trust ceases to be a foreign person or trust?

A refund of a surcharge paid is available where a person or trust was a foreign person or trust at the time of the acquisition of an interest in residential land, but then ceases to be a foreign person or trust not more than 12 months after the interest in the residential land was acquired.

Example

A trust was a foreign trust as a result of an identified object of the trust, Jesse, being a foreign person. Jesse paid the surcharge on the acquisition of an interest in residential land as trustee for the foreign trust.

If within 12 months after the acquisition of the interest Jesse ceased to be a foreign person (e.g. by becoming the holder of a permanent visa within the meaning of

Section 30(1) of the Migration Act 1958 (Cwlth)), the trust would also cease to be a foreign trust.

On application, a refund of the surcharge paid is due.

Example

Global Corporation is a foreign entity (being either a foreign corporation or foreign trust). Regional Pty Ltd is not a foreign entity.

In the case of a land holder acquisition under Part 4, Global Corporation and Regional Pty Ltd, as a group, acquire 100% (50% each) of the shares in a land holding entity and thereby notionally acquire an interest in residential land.

Land holder duty was paid on the acquisition of the 100% interest. Global Corporation further paid the surcharge on the acquisition of its 50% interest.

Global Corporation ceases to be a foreign entity within 12 months after the acquisition and retains its interest in the interest notionally acquired by the group.

Whilst the land holder duty paid on the acquisition remains payable, upon application by Global Corporation, a refund of the surcharge also paid is due.

What happens when a person or trust becomes a foreign person or trust within three years after the acquisition?

The surcharge will be retrospectively imposed where a person, corporation or trust becomes a foreign person, corporation or trust within three years of the acquisition of the interest in residential land. Where this occurs:

- the Commissioner must be notified in writing that the person or trust became foreign within 28 days;
- a surcharge is payable on the instrument or, in the case of an acquisition under Part 4, the transaction;
- the surcharge is to be regarded as having become payable when the person or the trust became a foreign person or a foreign trust; and
- interest and penalty tax may apply as if the failure to pay the surcharge at the date of the acquisition were a tax default under the *Taxation Administration Act 1996*.

Example

Jack acquired an interest in residential land, though was not a foreign person at the time as he held a permanent visa within the meaning of Section 30(1) of the Migration Act 1958 (Cwlth).

Two years after the acquisition. Jack ceases to hold the visa. As such Jack became a foreign person.

A surcharge is accordingly payable at the time Jack became a foreign person.

However, where a surcharge has been paid or is payable in respect of the transaction by virtue of which the person or trust became a foreign person or trust, the surcharge is reduced by the amount of the surcharge paid in respect of the transaction by virtue of which the person or trust became a foreign person or trust.

The reduction is in essence a rebate that ensures that two surcharges are not payable as a result of a transaction.

Example

Local2Global Pty Ltd is a corporation incorporated in an Australian jurisdiction, such that it is not a foreign corporation.

On 1 July 2018, Local2Global Pty Ltd acquires residential land valued at \$1 000 000 and is a land holding entity for the purposes of Part 4.

On 31 July 2018, Eddie, a foreign person acquires 50% of the shares in Local2Global Pty Ltd.

Eddie thereby acquires a prescribed interest in a land holding entity for the purposes of Part 4, with its 50% interest of \$1 000 000 being valued at \$500 000.

As a result of the acquisition, Local2Global Pty Ltd also becomes a foreign corporation, with 50% of its shareholding being held by Eddie.

The acquisition results in the following three amounts of duty being payable:

<i>Land Holder Duty (i)</i>	<i>\$21 330</i>
<i>Surcharge (7% of \$500 000) (ii)</i>	<i>\$35 000</i>
<i>Surcharge (7% of \$1 000 000) (iii)</i>	<i>\$35 000</i>
TOTAL PAYABLE	\$91 330

(i) Eddie is liable to pay land holder duty on the acquisition of Eddie's prescribed interest in Local2Global Pty Ltd (50% of \$1 000 000 being \$500 000).

(ii) Eddie is liable to pay a surcharge on the acquisition of Eddie's prescribed interest in Local2Global Pty Ltd (7% of \$500 000).

(iii) whilst a surcharge of \$70 000 (7% of \$1 000 000) would otherwise be payable as a result of Local2Global Pty Ltd becoming a foreign corporation, the amount of the surcharge payable (\$70 000) is reduced by the amount of the surcharge payable in respect of Eddie acquiring the prescribed interest in Local2Global Pty Ltd (\$35 000). As such, the surcharge payable is \$35 000.

Is the surcharge payable if the person or trust ceases to have the interest in the residential land prior to becoming a foreign person or trust?

A surcharge is not payable if the interest in the residential land was conveyed or transferred by the person or trust before the person or trust became a foreign person or trust.

Example

A unit trust acquired an interest in residential land on 1 January 2018.

On 30 May 2019, it sold its interest in residential land.

On 1 July 2019, a foreign person acquired 50% of the units. As such, the unit trust became a foreign trust.

However, no surcharge is payable as the interest in the residential land was conveyed or transferred by the unit trust before it became a foreign trust.

Does the surcharge apply where the residential land is not acquired as an investment?

The surcharge is payable irrespective of whether or not the land is being acquired for investment purposes.

When does the surcharge have to be paid?

The surcharge is to be paid no later than when the duty that is otherwise payable is paid.

How does the surcharge apply to acquisitions of an interest in both residential land and non-residential land?

Where an interest in both residential land and non-residential land is acquired, the surcharge only applies to the acquisition of the interest in residential land. The surcharge is not payable on the acquisition of the interest in non-residential land.

Example

On 1 February 2018, Zac, a foreign person, acquires 100% of Land Pty Ltd, a land holding entity and is liable to land holder duty under Part 4. Land Pty Ltd holds both residential and non-residential land (e.g. primary production land).

Whilst the land holder duty payable is calculated on the entire value of Land Pty Ltd's underlying land, being both residential and non-residential land, the surcharge additionally payable is calculated by reference to the residential land only.

Payment of the surcharge

For self determinations, the surcharge can be determined and paid via [RevenueSA Online](#).

For instruments lodged with RevenueSA for assessment, the surcharge will be assessed as part of the assessment of the instrument. The surcharge is paid when the duty on the instrument is paid.

When does the surcharge have to be paid for land holder acquisitions under Part 4?

Where a person or group acquires or increases a prescribed interest in a land holding entity and a surcharge is payable, in accordance with Part 4, the acquirer is required to lodge a return with the Commissioner and pay the relevant amount of duty and surcharge within two months of the date of the dutiable transaction.

The [Section 102B Return](#) is available on www.revenuesa.sa.gov.au and needs to be completed and submitted to RevenueSA with the transfer documents and other supporting documentation for assessment.

For further information regarding the operation of the land holder provisions under Part 4, please refer to the [Land Holder Guide to Legislation](#).

Further Information

Further information regarding the Foreign Ownership Surcharge can be found on the [Foreign Ownership Surcharge - Frequently Asked Questions](#) page.