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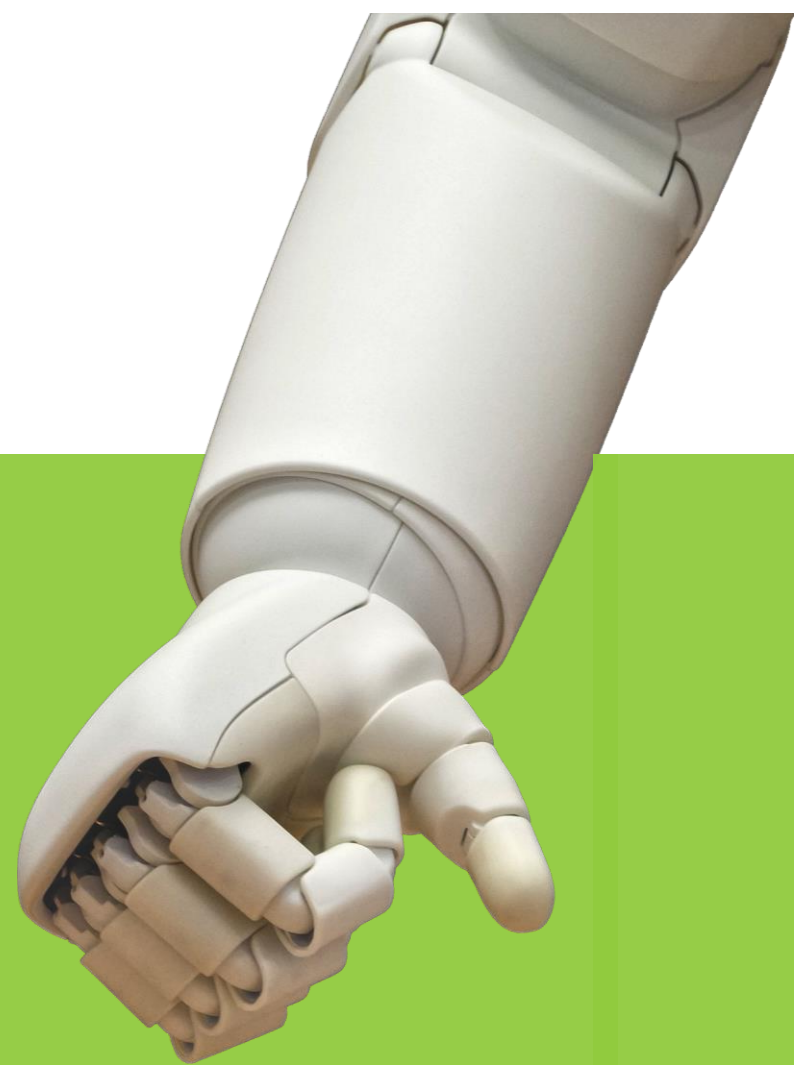


# Providing Solutions not Documents



# Foreign Person Land Tax and Duty Surcharges

with Grant Abbott from LightYear Docs  
and Tim Munro Change GPS



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## Trusts summary table

**Table 16: Trust total business income (TBI), by size, 2015–16 to 2017–18 income years**

Trust size (see <a href="#">definition</a> )	2015–16		2016–17		2017–18	
	Trusts (no.)	TBI (\$m)	Trusts (no.)	TBI (\$m)	Trusts (no.)	TBI (\$m)
<b>Loss</b>	560	–507	511	–638	500	–58
<b>Nil</b>	495,829	0	515,444	0	535,943	0
<b>Micro</b>	319,772	109,578	327,750	112,633	333,852	115,100
<b>Small</b>	25,161	99,798	26,333	104,157	27,103	107,287
<b>Medium</b>	4,373	103,999	4,597	109,532	4,638	109,617
<b>Large</b>	175	26,174	184	27,605	195	29,623
<b>Very large</b>	55	29,443	55	32,377	55	33,163
<b>Total</b>	<b>845,925</b>	<b>368,486</b>	<b>874,874</b>	<b>385,667</b>	<b>902,286</b>	<b>394,732</b>

# NSW Revenue

For the purposes of the duties and land tax surcharges on foreign persons, “foreign person” means a person who is a foreign person within the meaning of the Foreign Acquisitions and Takeovers Act 1975 (FAT Act) of the Commonwealth, as modified by section 104J of the Duties Act 1997. Revenue Ruling G9 explains the definition in detail.

For a discretionary trust, each beneficiary to whom the trustee has discretion to distribute the income or property is deemed to have the maximum percentage interest in the income or property that the trustee may exercise a discretion to distribute to them. A beneficiary holds a substantial interest in a discretionary trust if the beneficiary, with any one or more associates, holds a beneficial interest in at least 20 per cent of the income or property of the trust (see the definition of 'substantial interest' in section 4 of the FAT Act).

The result is that any beneficiary who is a foreign person will almost always be deemed to hold a substantial interest in the trust, and the trustee will be deemed to be a foreign person who will be potentially liable for surcharge purchaser duty and surcharge land tax.

Discretionary trust deeds often give the trustee wide powers to distribute income and/or property, such as to family or other relatives of the settlor and in many cases to charities. If any one of the potential beneficiaries is a foreign person, the trustee may be liable for surcharge. Consequently, a discretionary trust may be liable for the foreign person surcharges even though none of the beneficiaries who actually receive or are likely to receive distributions of income or capital are foreign persons.

# South Australia Stamp Duties Act 1923

## Section 2(14) - Foreign Trust – from 1 January 2018

A trust is a foreign trust if—

- (i) in the case of a trust where the beneficial interests are fixed—a beneficial interest of 50% or more of the capital of the trust property is held by 1 or more foreign persons; or
- (ii) in the case of a discretionary trust—1 or more of the following is a foreign person:
  - (A) a trustee;
  - (B) a person who has the power to appoint under the trust;
  - (C) an identified object under the trust;
  - (D) a person who takes capital of the trust property in default;

- **7% duty surcharge on acquisition of residential property – self assessment when lodge a return: <https://www.revenuesa.sa.gov.au/taxes-and-duties/foreign-ownership-surcharge>**

# Victorian State Office of Revenue

**From 1 March 2020, the State Revenue Office will no longer apply the practical approach – 8% surcharge duty**

The provisions have been in place for more than four years and the special rules for discretionary trusts are better understood by all (or at the very least all advisers on Victorian state taxes). Accordingly, from 1 March 2020, the State Revenue Office will no longer apply the practical approach. Instead, the special rules for discretionary trusts will be applied to all discretionary trusts (including family discretionary trusts), so that if the discretionary trust has any potential foreign beneficiary, the trust will generally be a foreign trust for the purpose of the provisions.

The State Revenue Office notes that this change may cause the continued use of some discretionary trusts that do not include an express beneficiary exclusion clause for foreign natural persons, foreign corporations or trustees of foreign trusts to be a foreign trust. However, this outcome is considered to be the result of broad beneficiary clauses in the trust deeds which is within the control of the purchaser.

**If you are a purchaser or transferee of property in Victoria and you enter into a contract, transaction, agreement or arrangement on or after 1 July 2015, you must provide information that shows you are foreign purchaser when you lodge your [Digital Duties Form](#).**

# Queensland Treasury – Land Tax

## Public Ruling LTA000.3.1 Foreign corporations and foreign trusts—interests of foreign persons and related persons

This public ruling clarifies how interests of foreign persons and related persons will be considered when determining whether foreign persons have a controlling interest in a corporation or at least 50% of the trust interests in a trust for the purposes of Part 3, Division 4 of the *Land Tax Act 2010* (the Land Tax Act).

1. Each of the following are foreign persons:

1. an individual who is not an Australian citizen or permanent resident<sup>1</sup>
2. a foreign company
3. a trustee of a foreign trust.<sup>2</sup>

2. A trust is a ‘foreign trust’ if at least 50% of the trust interests in the trust are foreign interests.<sup>4</sup> A ‘foreign interest’ is any of the following:

1. a trust interest of an individual who is not an Australia citizen or permanent resident
2. a trust interest of a foreign company
3. a trust interest of a trustee of a foreign trust
4. a trust interest held by a related person of a person mentioned in (a) to (c) above.

1. ‘Trust interest’ is a person’s interest as a beneficiary of a trust, other than a life interest. For a discretionary trust, only a taker in default of an appointment by the trustee can have a trust interest. *For a superannuation fund, a member of the fund has a trust interest in the fund.*<sup>5</sup>

# The Non-Foreign Person Exclusion

- Leading Member Suite of Non Foreign Person Discretionary Trusts
  - ❖ The NFP Discretionary Trust
  - ❖ The NFP Leading Member Discretionary Trust
  - ❖ Upgrade to the NFP Discretionary Trust
  - ❖ Upgrade to the NFP Leading Member Discretionary Trust



# The Final Word

- Don't get caught out and this is a moving feast as more and more States go down the NSW way
- Use the Change GPS material to get in front of clients on this issue
- Expect land tax surcharges for foreign person aka absentee person to roll out across all States
- Upgrades are only \$99 or we have unlimited options or we can do bulk if need be
- And don't forget the Leading Member suite which provides family wealth protection for the bloodline stopping any dilution of family wealth
- If you need help please contact us at LightYear Docs or at Abbott & Mourly lawyers
- Also 1 February for Change GPS in Brisbane and LightYear across Australia tour starting 18 March

