



FOREIGN BENEFICIARIES OF FAMILY TRUSTS

Given that family discretionary trusts are often used to buy investment properties in Australia, it is essential that Guidance Note 5 published by the Foreign Investment Review Board is considered before the property is acquired.

Guidance Note 5 indicates that the trustee of a discretionary trust which has any beneficiaries who are "foreign persons", will itself be regarded as a foreign person. This is because a trustee of a discretionary trust has the power to distribute some or all of the income or property of that trust to one or more beneficiaries so that one person, who may be a foreign person, can receive all of the income of the trust and all of the assets of the trust.

Most discretionary deeds have a wide definition of "General Beneficiaries", it is possible therefore that one of those beneficiaries may be a foreign person for the purposes of the *Foreign Acquisitions and Takeovers Act 1975 (Act)*.

If the trustee is a deemed foreign person, it would only be able to buy that property if it is a new dwelling, vacant land for residential development, or established dwellings for redevelopment into multiple dwellings. Foreign persons are generally ineligible to purchase established dwellings such as homes, holiday homes or apartments. In addition to these restrictions, from 9 May 2017, foreign persons who purchase residential real estate will be subject to an annual vacancy charge where the property is not rented out or occupied for more than six months per year.

It is interesting to note that The Commissioner of State Revenue in NSW has recently published a Practice Note on the application of the transfer duty surcharge to discretionary trusts which have potential or named beneficiaries who are foreign persons. To be exempt from the foreign surcharges, the Practice Note states that "amendments made [to the trust deed] must prevent potential beneficiaries that are foreign persons from receiving distributions as to income and/or capital under the trust. Any amendments made must also be irrevocable."

Given the above, it would be prudent to review the definition of "General Beneficiaries" in the trust deed before acquiring the property. Getting this issue wrong can result in quite drastic consequences, including a forced sale of the property.

Author:

[Mike Frampton](#)

Partner: Tax, Commercial & Estate Planning

mike.frampton@murfett.com.au