



COMMISSIONER'S PRACTICE DA 44.0

Residential Property and Foreign Persons for the Purposes of Foreign Transfer Duty

This Commissioner's practice outlines how the Commissioner of State Revenue ('Commissioner') will determine, for the purposes of foreign transfer duty, a person's foreign status and whether property is residential property.

This Practice should be read in conjunction with Duties Fact Sheet '[Foreign Transfer Duty](#)'.

Background

From 1 January 2019, the *Duties Act 2008* ('Duties Act') imposes additional duty on certain acquisitions of *residential property* by *foreign persons*.¹

Residential property is defined in section 205E of the Duties Act to mean:

- (a) land in Western Australia that is, is capable of being, or is intended to be, used solely or dominantly for residential purposes;
- (b) vacant or substantially vacant land in Western Australia that is zoned solely for residential purposes; or
- (c) any estate or interest in land as described in (a) or (b).

Foreign person is defined in section 205A of the Duties Act to mean:

- (a) a foreign individual; or
- (b) a foreign corporation; or
- (c) a foreign trustee.

Foreign individual is defined in section 205A to mean an individual who is not:

- (a) an Australian citizen as defined in the *Australian Citizenship Act 2007* (Cth) section 3; or
- (b) the holder of a permanent visa or a special category visa as defined in the *Migration Act 1958* (Cth) section (5)(1).

Foreign corporation is defined in section 205C of the Duties Act to mean:

- (a) a corporation that was incorporated outside Australia; or
- (b) a corporation in which foreign persons have a controlling interest.

Foreign trustee means a trustee of a *foreign trust* which is defined in section 205D of the Duties Act as:

- (a) a discretionary trust controlled by a foreign person; or
- (b) a discretionary trust where one or more foreign persons that are takers in default, together with their associates, hold at least 50 per cent interest in the discretionary trust; or

¹ As amended by the *Duties Amendment (Additional Duty for Foreign Persons) Act 2018*.

- (c) a trust other than a discretionary trust where one or more foreign persons, together with their associates, hold beneficial interests in at least 50 per cent of the income of the trust.

Land includes any estate or interest in land or anything that is part of the land as a fixture.

The value of any chattels sold with residential property will be aggregated with the value of the residential property if the chattels are directly linked to or are incidental to the use of the property for residential purposes.

Certain property is excluded residential property for which foreign transfer duty will not apply. This includes:

- (a) land that is intended to be used solely or dominantly for the purposes of an aged care facility;²
- (b) land that is intended to be used solely or dominantly for the purposes of commercial residential premises;³
- (c) land that is intended to be used solely or dominantly for the purposes of a retirement village;⁴
- (d) an easement;⁵
- (e) a security interest; and
- (f) a carbon right or carbon covenant registered under the *Carbon Rights Act 2003*.

Commissioner's Practice

1. To determine whether land is residential property, the Commissioner will consider the current and intended use of the land at the date of the transaction, as well as the zoning of the land under the applicable planning scheme.⁶
 - 1.1 Where multiple lots of property are purchased together, each lot will be considered separately to determine if the lot is residential property.
 - 1.2 Property that is mixed-use to the extent that the land is not used (or intended to be used) solely or dominantly for residential purposes will not be considered residential property.
2. Examples of chattels that the Commissioner will aggregate with the value of the residential property include white goods, furniture, appliances, air conditioners, gardening equipment and portable pools.
3. Residential property is land that is capable of being, or intended to be used, solely or dominantly for residential purposes. 'Solely' and 'dominantly' are not defined in the Duties Act, and whether land is used solely or dominantly for residential purposes will be determined on a case-by-case basis.

² As defined in the *Land Tax Assessment Act 2002* section 38A(1).

³ As defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) section 191-1. This includes hotels, motels, inns, hostels and boarding houses.

⁴ As defined in the *Retirement Villages Act 1992* section 3(1).

⁵ The Foreign Transfer Duty Declaration Form is not required for easements.

⁶ As defined in the *Planning and Development Act 2005* s 4(1).

4. Land used 'solely' for residential purposes is land that is or will be used exclusively or only for residential purposes.
5. The Commissioner may consider the following factors in making a determination that land is, is capable, or is intended to be used solely or dominantly for residential purposes:
 - 5.1 the overall nature and use, or intended use, of the land, including any buildings;
 - 5.2 the extent of the various uses of the land and buildings;
 - 5.3 the proportion of the area that the land and buildings capable of being used, or intended to be used, for residential purposes bears to the total area of the land and buildings;
 - 5.4 the value of the land used for residential and non-residential purposes;
 - 5.5 the commercial viability of the residential and non-residential uses; and
 - 5.6 the proportion of the construction costs attributable to the land and any buildings that are or will be used for residential purposes compared to the total costs.No particular factor will necessarily be determinative and every case will depend on its facts.
6. The following examples of properties will generally be considered capable of being, or intended to be, used solely or dominantly for residential purposes:
 - 6.1 established houses and apartments;
 - 6.2 commercial property that a person intends to convert into a residence;
 - 6.3 land on which a person intends to construct a residence;
 - 6.4 land which a person intends to develop into residential properties or subdivide to enable another person to construct a home or apartment on the land; or
 - 6.5 partially constructed residences which a person intends to complete.

Example 1 – Intention to use for residential purposes

Toby Barker, a foreign individual, enters into an agreement to purchase a small commercial property in a residential area which is currently being used as a dental surgery. The dental surgery was used as residence for 50 years prior to it being refurbished into a dental surgery. The land is suitable for both residential and commercial use.

Toby declares to the Commissioner that he intends to convert the entire property back into a residence, removing the dentist reception area, and leasing it to residential tenants in the coming 6 to 12 months.

The agreement for the transfer of the property is assessed with foreign transfer duty as the Commissioner is satisfied there is an intention to use the land solely or dominantly for residential purposes.

Example 2 – Intention to use as commercial residential premises

Hotels Ltd, a foreign corporation specialising in building hotels, has agreed to purchase a partially built residential apartment tower after the original owner went into liquidation.

Hotels Ltd have obtained the relevant approvals to construct a hotel and declare to the Commissioner that intend to complete construction of the building with appropriate modifications within twelve months.

The property is not considered substantially vacant land or land capable of being used for residential purposes at the date of the agreement.

Foreign transfer duty is not chargeable on the transaction as the Commissioner is satisfied the property is intended to be used solely as a commercial residential premises which is excluded from residential property for the purposes of foreign transfer duty.

Change to a person's foreign status

7. If the status of a foreign person changes between the agreement for purchasing residential property and the transfer of that property, the Commissioner may reassess any foreign transfer duty charged on the agreement as exempt. The following factors will be considered when determining whether foreign transfer duty will be reassessed:

7.1 Foreign individuals:

- 7.1.1 The date the Certificate of Australian Citizenship was granted; or
- 7.1.2 The date permanent residency or special category visa was granted.

7.2 Foreign corporations:

- 7.2.1 The company constitution, articles of association and any amendments.
- 7.2.2 Any minutes of meetings and directors resolutions outlining changes to members or voting rights.
- 7.2.3 Share transfers and share certificates.
- 7.2.4 The ASIC extract immediately prior to the date of transfer of the property.

7.3 Foreign trusts:

- 7.3.1 The trust deed of the trust and any amending deeds removing and appointing new trustees, appointers or takers in default.

Example 3 – foreign individual

Jack White, a foreign person, has entered into an agreement to purchase a residential property.

Jack paid transfer duty and foreign transfer duty on the agreement. Prior to settlement and transfer of the property to Jack, he receives permanent residency in Australia.

Jack makes application to the Commissioner for a reassessment of the foreign transfer duty he paid on the agreement. Together with the application, Jack provides a copy of the permanent residency letter to the Commissioner as evidence he is no longer a foreign person. The agreement is reassessed with foreign transfer duty exempt.

Example 4 – foreign corporation

Star Corporation Pty Ltd is a company incorporated in Australia that has ten equal shareholders.

60% of the shares are held by foreign individuals with the remaining 40% held by Australian Citizens. None of the shareholders are associates of each other. Star Corporation is considered a foreign corporation since 50% or more of the shares in the company are held by foreign persons.

Star Corporation enters into an agreement to purchase residential property which is charged with foreign transfer duty.

Prior to transferring the property to Star Corporation, two of the foreign shareholders decide to sell their shares to local shareholders in the company. At the date of transfer, Star Corporation has 40% of shares held by foreign individuals and 60% held by local shareholders.

Star Corporation applies for a reassessment on the agreement to transfer the property providing the company constitution, copies of the share transfers and ASIC extract of the shareholdings in the company at the date of the transfer of the property to Star Corporation.

The agreement is reassessed and endorsed as exempt from foreign transfer duty.

8. Where the status of a foreign person changes before the property is transferred to the person, application for reassessment must be made using form [FDA42 'Foreign Transfer Duty - Change in Foreign Status'](#). This form should be accompanied by the transaction record if it is not already in the Commissioner's possession.

Date of Effect

This Commissioner's practice takes effect from 1 January 2019.

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COMMISSIONER OF STATE REVENUE

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Commissioner's Practice History

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