Foreign Transfer Duty

1 January 2019

Under the *Duties Act 2008* ('Duties Act'), transfer duty is imposed on dutiable transactions over dutiable property including transfers of property. The person liable to pay duty is generally the purchaser, transferee or person receiving the dutiable property.

From 1 January 2019, the Duties Act imposes additional duty of 7% on certain acquisitions of residential property by foreign persons.[1]

In most cases, liability for duty arises on the date the document evidencing the transaction is signed. For example, liability for duty on an agreement to transfer dutiable property, such as a contract for sale for the purchase of land, will be when the agreement is first made (i.e. when the contract is signed by all parties). Some transactions may be exempt from duty or eligible for nominal duty.

See the Office of State Revenue website for information about dutiable property and dutiable transactions.

Each purchaser must complete a foreign transfer duty declaration if the transaction involves land.

Residential Property

Residential property is:

(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).

More information about residential property and exemptions from the application of foreign transfer duty is provided later in this fact sheet and in Commissioner's Practice DA 44 'Residential Property for the Purposes of Foreign Transfer Duty'.

Foreign Person

A foreign person can be:

(a) a foreign individual; or

(b) a foreign corporation; or

(c) a foreign trustee.

[1] *Duties Act 2008* Chapter 3A inserted by the *Duties Amendment (Additional Duty for Foreign Persons) Bill 2018*.

Foreign Individual

Individuals who are not Australian citizens are foreign individuals unless they hold a permanent or special category visa, as determined by the Department of Home Affairs.[2]

- A *permanent visa* is a visa to remain in Australia indefinitely. Holders of permanent visas are commonly referred to as Australian permanent residents.
- A *special category visa* refers to a visa for New Zealand citizens who wish to visit, stay or work in Australia.

Foreign Corporation

A foreign corporation is:

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

Foreign persons are taken to have a controlling interest in a corporation if one or more foreign persons or their associates directly or indirectly control at least 50 per cent of the voting or potential voting power,[3] or hold at least 50 per cent of the issued shares in the corporation.[4]

Voting power in a corporation refers to the number of votes that might be cast at a general meeting of a corporation. Potential voting power in a corporation refers to the voting power based on the assumption that the votes:

- may exist in the future because of an exercise of a right, and
- if they came into existence, would be capable of being cast at a general meeting of a corporation.[5]

Example 1

XYZ Pty Ltd has five shareholders:

- Shareholder 1 – Local (10 per cent)
- Shareholder 2 – Foreign (15 per cent)
- Shareholder 3 – Local (30 per cent)
- Shareholder 4 – Foreign (25 per cent)
- Shareholder 5 – Local (20 per cent)

To determine whether a corporation is a foreign corporation, the interests of all foreign shareholders are aggregated. The aggregated interests of foreign shareholders 2 and 4 in XYZ Pty Ltd is 40 per cent.

Shareholders 3 and 5 are spouses of shareholders 2 and 4 and are therefore deemed to be associates. Their 50 per cent interest must be aggregated with those of the foreign shareholders.

XYZ Pty Ltd is a foreign corporation because the aggregated interest of foreign persons and their associates is 90 per cent.

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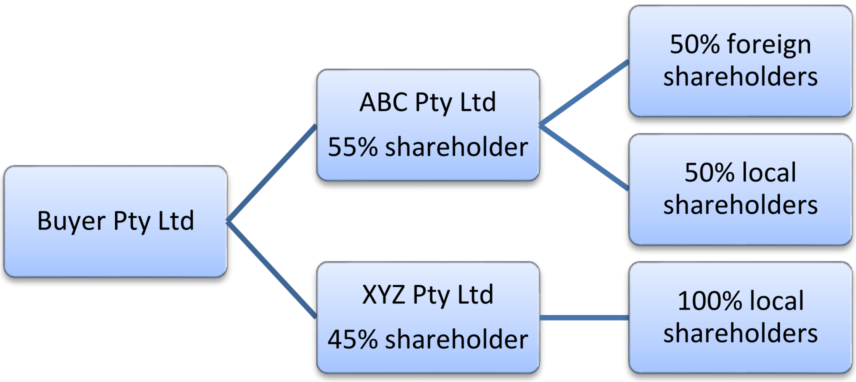
2 https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/special-category-visa-subclass-444

3 As defined in the *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4.

4 *Duties Act 2008* s 205C.

5 For example, a shareholder who holds 30 per cent of the general shares in a corporation and an option to acquire a further 5 per cent is said to have 35 per cent potential voting power (assuming all shares have equal voting rights).

Example 2



Buyer Pty Ltd has acquired a vacant parcel of land zoned solely for residential purposes.

To determine whether Buyer Pty Ltd is a foreign corporation, the Commissioner will consider whether its shareholders are foreign. Buyer Pty Ltd's majority shareholder, ABC Pty Ltd, has 50 per cent foreign ownership and is considered a foreign corporation.

Because ABC Pty Ltd is a foreign corporation and owns 55 per cent of the shares in Buyer Pty Ltd, Buyer Pty Ltd is also considered to be a foreign corporation.

Foreign Trustee

A foreign trustee is a trustee of a foreign trust. An individual or corporation acting as trustee for a foreign trust is considered a foreign trustee, irrespective of whether they are a foreign person in their own capacity.

A foreign trust is:

- a discretionary trust controlled by a foreign person; or
- 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
- 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.

A person controls a discretionary trust if they are in a position to directly or indirectly influence the vesting of the capital of the trust property or the distribution of income from the trust property.

Example 3

John Smith, an Australian citizen, is trustee for the Smith Family Trust ('the Trust'). He is also one of the takers in default of the Trust. John's wife, Jean Smith, is a foreign individual and is the other taker in default.

John's father, who is also foreign, is the appointor of the Trust.

The Trust is a foreign trust on the following basis:

1. Jean as one of the takers in default of the Trust holds 50% of the interest in the Trust.
2. John is an associate of Jean on the basis they are husband and wife. Together they hold 100 per cent of the interest in the Trust.
3. The Trust appointer who controls the appointment of new trustees is a foreign individual.

Any one of the above factors would make the Trust a foreign trust.

Example 4

John Smith, an Australian citizen, is trustee for the Property Investment Unit Trust ('the Trust') which has a total of 100 units.

Sixty units are held by foreign persons and their associates, which gives them a beneficial interest of 60 per cent of the trust's income and property.

John Smith enters into a contract to buy a residential property on behalf of the Trust.

John Smith is considered to be a foreign trustee because foreign persons and their associates hold beneficial interests in at least 50 per cent of the trust income or property. Foreign transfer duty is chargeable on the dutiable transaction.

Associates

To determine whether a corporation or a trustee is foreign, the relevant interests in the corporation or trust held by foreign persons and all their associates will be aggregated, regardless of whether the associates are foreign persons or are associates of one another.

A person is an associate[6] of another person if they are:

- family members;[7] or
- partners in the same partnership; or
- related corporations;[8] or
- trustees of trusts sharing a common beneficiary; or
- an individual and a corporation where that individual is a majority shareholder[9], director or secretary of the corporation (or a related corporation); or
- a trustee and a beneficiary of the same trust; or
- a corporation and a trustee of a trust where the corporation or its majority shareholder, director or secretary is a beneficiary; or
- a corporation and a trustee of a trust where a related corporation is a beneficiary.

If a beneficiary of a trust, other than a unit trust scheme or a discretionary trust, is an associate of a person, the trustee of the trust is also treated as an associate of that person.

Example 5

ABC Pty Ltd has two shareholders, Jane Smith who holds 45% of the shares and David Clark who holds 55% of the shares as bare trustee for John Smith. Jane Smith and John Smith are husband and wife. Therefore, David is treated as an associate of John.

6 *Duties Act 2008* s 205B.

7 *Duties Act 2008* s 100.

8 Related corporation has the same meaning as related body corporate, as defined in the *Corporations Act 2001* (Cth) s 50.

9 *Duties Act 2008* s 3.

Residential Property

For the purposes of foreign transfer duty, residential property is land which is:

(a) currently used, capable of being used, or intended to be used solely or dominantly for residential purposes; or

(b) vacant (or substantially vacant) and zoned solely for residential purposes,

and 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 as long as the chattels are directly linked to or are incidental to the use of the property for residential purposes. Examples include white goods, furniture, appliances, air conditioners, gardening equipment and portable pools.

Example of properties that are capable of being (or intended to be) used solely or dominantly for residential purposes include:

- established homes and apartments;
- commercial property that a person intends to convert into a residence;
- land on which a person intends to construct a residence;
- 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
- partially constructed residences which a person intends to complete.

Where multiple lots of property are purchased together, each lot will be considered separately to determine if the lot is residential property.

Example 6

PetCare Pty Ltd, a foreign corporation, has entered into a contract to purchase a four bedroom house that is zoned residential.

The contract is conditional on the property being successfully approved for commercial/mixed-use prior to settlement as PetCare Pty Ltd intends to turn the property into a local veterinary clinic.

At the time liability for duty arises, the house is capable of being used solely or dominantly for residential purposes and is considered to be residential property. The transaction is chargeable with foreign transfer duty.

Excluded Residential Property

Certain property is specifically excluded[10] from foreign transfer duty:

- land that is intended to be used solely or dominantly for the purposes of an aged care facility as defined in the *Land Tax Assessment Act 2002* section 38A(1);
- land that is intended to be used solely or dominantly for the purposes of commercial residential premises[11] as defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) section 191-1;
- land that is intended to be used solely or dominantly for the purposes of a retirement village as defined in the *Retirement Villages Act 1992* section 3(1);

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[10] Because it is not residential property for the purposes of section 205E(1) of the *Duties Act.*

[11] Includes hotels, motels, inns, hostels and boarding houses. For a full definition, see *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 191-1.

- an easement;
- a security interest; and
- a carbon right or carbon covenant registered under the *Carbon Rights Act 2003*.

Exempt Transactions

If all or part of a dutiable transaction is exempt from transfer duty or chargeable with nominal duty, that same component of the transaction will generally be exempt from foreign transfer duty. Foreign transfer duty may be chargeable on the proportion of the dutiable value that does not qualify for the exemption or nominal duty.

Examples of exempt dutiable transactions include a partition of property,[12] transfers of property effected by a matrimonial or de facto instrument (family court orders and financial agreements)[13] and cancelled transactions.[14]

Example 7

Under the terms of the will, Jane and Jack are entitled to a half share in a residential property each. Jack is a foreign individual.

Jane and Jack sign a deed of family arrangement through which Jack will get the whole property in exchange for paying Jane 50 per cent of the property's market value. The residential property is transferred to Jack.

Nominal duty is chargeable on the transfer of the 50 per cent of the property Jack was originally entitled to. Foreign transfer duty is therefore exempt for that portion. The other 50 per cent transferred to Jack is chargeable with both transfer duty and foreign transfer duty.

Where the transferee is not a foreign person

An agreement to transfer residential property will be exempt from foreign transfer duty in certain circumstances where the transferee on the transfer of land is not a foreign person.

The exemption applies where the purchaser on the agreement is a foreign person but the transferee on the transfer is not, and:

- the transferee is related to the purchaser;[15] or
- the purchaser was acting as agent for the transferee;[16] or
- the purchaser is a trustee for a related beneficiary;[17] or
- the purchaser enters into an agreement to acquire dutiable property with the intention of transferring the property to a corporation which was in the process of being incorporated, or a dormant corporation which was in the process of being acquired.[18]

Foreign transfer duty will be exempt on an agreement to purchase residential property if a purchaser who was a foreign person at the time of executing the agreement is no longer a foreign person at the time the property is transferred to them.

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12 *Duties Act 2008* s 39.

13 *Duties Act 2008* ss 128-133.

14 *Duties Act 2008* s 88A, 107.

15 *Duties Act 2008* s 42(2).

16 *Duties Act 2008* s 42(4).

17 *Duties Act 2008* s 42(4B).

18 *Duties Act 2008* s 42(5).

Example 8

James, a foreign individual, enters into an agreement to purchase a residential property off the plan, to be completed in two years' time. The agreement is assessed for transfer duty and foreign transfer duty.

Prior to completion and transfer of the property, James becomes a permanent resident. James applies for reassessment of the agreement on the basis that he is no longer a foreign individual.

The agreement is reassessed as no longer chargeable with foreign transfer duty.

Residential Developer Exemptions

Land acquired for residential developments by foreign persons is chargeable with foreign transfer duty at the time the property is acquired. Where the development will produce 10 or more residential dwellings, or lots on which 10 or more dwellings can be constructed, the foreign transfer duty paid on the acquisition of the property may be reassessed and refunded to the taxpayer.[19]

Please complete and submit Form FDA43 'Foreign Transfer Duty – Developer Exemptions'.

Certain transactions exempt from transfer duty but chargeable with foreign transfer duty

Certain dutiable transactions that are exempt from transfer duty or qualify for nominal duty may still be chargeable with foreign transfer duty. Foreign transfer duty will not apply to the transaction if the residential property was originally acquired by the transferor prior to 1 January 2019.

Where the transaction attracts foreign transfer duty the dutiable value of the transaction is the consideration or unencumbered value of the interest in the property to be held by the foreign person at the date the transaction is signed by the parties.

Transfers between spouses or de facto partners

Under section 97 of the Duties Act, a transfer of certain residential property between spouses or de facto partners is exempt from transfer duty.

Where a person acquires property on or after 1 January 2019 and transfers a 50 per cent interest in the property to a spouse or de facto partner who is a foreign person, foreign transfer duty is chargeable on the 50 per cent transfer unless foreign transfer duty was paid on the original acquisition of the property.

Example 9

Allen Jones, a foreign individual, purchased a residential property on 4 January 2019. Both transfer duty and foreign transfer duty were chargeable on the transaction and were paid prior to settlement. Allen moved into the property with his de facto partner Gina McCarthy (also a foreign individual) as their primary place of residence.

Six months later, Allen transfers a half share of the property to Gina so they hold the property as joint tenants. Allen has applied for an exemption from transfer duty for transfers between spouses.

Foreign transfer duty has already been paid on the original purchase of the property by Allen, and the transfer of 50 per cent to Gina is exempt from both transfer duty and foreign transfer duty.

If Allen was not a foreign individual at the time of purchasing the property and foreign transfer duty was not chargeable, the transfer to Gina would be charged with foreign transfer duty on 50 per cent of the dutiable value of the residential property.

[19] For eligibility criteria and application timeframes, refer to sections 205ZA, 205ZB and 205ZC of the *Duties Act 2008*.

Vesting of a discretionary trust

Under section 114 of the Duties Act, nominal duty is applied to an eligible transfer of property to a taker in default of a discretionary trust on the vesting or termination of the trust.

If the trust acquired the property on or after 1 January 2019 and foreign transfer duty was not chargeable on the original acquisition of the property by the discretionary trust, foreign transfer duty will apply to the transfer of residential property arising from the vesting or termination of the trust if the taker in default is a foreign person.

Transfers of dutiable property to a beneficiary of a trust

Under sections 115 and 116 of the Duties Act, nominal duty is applied to transfers of trust property to a beneficiary of the trust.

If the trust acquired the property on or after 1 January 2019 and foreign transfer duty was not chargeable on the acquisition of the property by the trustee, foreign transfer duty will apply to the subsequent transfer to a beneficiary who is a foreign person.

Transfers to a real purchaser

Under section 117 of the Duties Act, nominal duty is applied to certain dutiable transactions where property is vested in an apparent purchaser to be held for the real purchaser who provided the consideration to acquire the property.

If the apparent purchaser acquired the property on or after 1 January 2019 and foreign transfer duty was not chargeable on the acquisition of the property by the apparent purchaser, foreign transfer duty will apply to the subsequent transfer of the residential property to a foreign real purchaser.

Example 10

Jane Walker, an Australian Citizen, enters into an agreement on 20 January 2019 to purchase a residential property for her sister, Mary, who is a foreign person. Jane declares the real purchaser of the property is Mary, a foreign person, and the agreement is assessed and endorsed for both transfer duty and foreign transfer duty.

Four weeks later, Jane submits a transfer of land transferring the property to Mary with evidence that Mary provided the funds for the purchase and was the real purchaser under the agreement.

The transfer of land is chargeable with nominal duty pursuant to section 117 of the Duties Act, while foreign transfer duty is exempt. This outcome recognises that foreign transfer duty has already been paid by the real purchaser.

No Double Duty

Foreign transfer duty will not be charged on two dutiable transactions relating to the same acquisition.[20] This applies to the transfer of residential property if the agreement has already been endorsed for foreign transfer duty and the transfer is in conformity with the agreement. The agreement will only be foreign transfer duty endorsed if the purchaser named on the agreement is a foreign person.

If a transfer of residential property to a foreign person is not in conformity with an agreement because the transferee is different to the purchaser, foreign transfer duty will not be chargeable on the transfer if the agreement has already been endorsed for foreign transfer duty and section 42(2), (4), (4B), (5) or (7) applies to provide relief from transfer duty on the transfer.

For more information, see Duties Fact Sheet 'No Double Duty Transactions'.

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20 Section 205Q of the *Duties Act* applies Chapter 2 Part 4 Division 6 (sections 41-43) to foreign transfer duty.

Example 11

Jodie Smith enters into a contract to purchase a residential property in her own name. Prior to settlement, Jodie decides the land should be held by both herself and her de facto partner Adam Walker. Both Jodie and Adam are foreign individuals. A transfer of land is lodged for duty endorsement naming Jodie and Adam as the transferees.

Foreign transfer duty is chargeable on the contract and is paid in full.

Because transfer duty and foreign transfer duty were paid on the contract to purchase the property, the subsequent transfer of land is endorsed for no double duty.

If Jodie was an Australian citizen, foreign transfer duty would not have been chargeable on the contract. The subsequent transfer to Adam as a foreign person would be endorsed for no double transfer duty, and foreign transfer duty would be chargeable in relation to 50% of the property acquired by Adam.

First Home Owners

Where a first home owner purchases a property and the first home owner rate of duty is applied to the transaction, foreign transfer duty may apply where the purchaser is a foreign person. This means that although the transaction may not attract any transfer duty, it will still be chargeable with foreign transfer duty on the dutiable value of the foreign person's interest in the property.

Example 12

Kate Richards and her de facto partner, Simon, are first home buyers and enter into an agreement, as joint tenants, to purchase a home for $400,000.

Kate is an Australian Citizen and Simon is a foreign person.

Kate and Simon are eligible for the first home owner rate of duty on the agreement to purchase the property. There is no transfer duty payable on the contract as it is below the first home owner rate thresholds.

The foreign transfer duty chargeable on Simon's 50% joint tenant interest in the property is $14,000 ($200,000 x 7 per cent).

Contact the Office of State Revenue

Office	Office of State Revenue 200 St Georges Terrace PERTH WA 6000	**Telephone**	9262 1100
		Enquiries	http://www.osr.wa.gov.au/DutiesEnquiry
Postal	Office of State Revenue GPO Box T1600 PERTH WA 6845	**Website**	www.finance.wa.gov.au