

**REVENUE CIRCULAR LTA002**

Foreign Ownership Surcharge – *Land Tax Act 2004*

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Status: Current – Effective 1 July 2018

Previous Circular: N/A

## Introduction

From 1 July 2018, a foreign ownership surcharge (the surcharge) is imposed under part 2A of the *Land Tax Act 2004* (the Act) on residential property owned by a foreign person, including a foreign individual, corporation or trustee of a foreign trust.

This circular explains how the surcharge applies.

## Imposition of surcharge

Section 17E of the Act imposes the foreign ownership surcharge for each quarter on each parcel of residential land owned by a foreign person on the first day of the quarter (1 July, 1 October, 1 January or 1 April). The surcharge is separate from land tax, which is imposed under section 9 of the Act.

Section 17A of the Act defines a ‘foreign person’ as:

- a foreign individual;
- a foreign corporation; or
- the trustee of a foreign trust; but
- not the personal representative of a deceased person.

Rules for applying the surcharge for a quarter are outlined in sections 17D to 17F of the Act. Liability of a parcel of land for the surcharge is determined by reference to its ownership by a foreign person on the first day of the quarter, unless an exemption applies.

If there is a mixture of ownership between foreign and non-foreign owners, the surcharge is payable in proportion to the value of the interests in the parcel held by foreign people.

## Foreign individuals

Section 17A of the Act defines a ‘foreign individual’ as an individual (natural person) who is not, on the first day of a quarter:

- an Australian citizen;
- a permanent resident; or
- a person ordinarily resident in Australia or an external territory<sup>1</sup> (an ordinary resident).

A person who is a foreign individual on the first day of a quarter, but becomes an Australian citizen, permanent resident or ordinary resident during the quarter, becomes exempt from the first day of the following quarter.

### Example – timing of foreign status

*Hanna, a foreign citizen, becomes the owner of a property in Canberra on 1 April 2019. She migrates to Australia on 20 September 2019 with the intention to live in Australia indefinitely.*

*Hanna is liable for the surcharge in the quarters beginning 1 April 2019 and 1 July 2019, as she was a foreign individual on each of those dates. She is required to notify the Commissioner about her status within 30 days after 1 April 2019.*

*As at 1 October 2019, Hanna is an ordinary resident of Australia because she is residing in Australia on that date. Hanna stops being liable for the surcharge from that date.*

## Permanent residents

‘Permanent resident’ is defined as a person who holds a permanent visa or Special Category visa under sections 30 (1) and 32 of the *Migration Act 1958* (Cwlth) respectively.

Permanent visa holders are Australian permanent residents.

Special Category Visa (SCV) holders are granted to eligible New Zealand citizens and are valid until the time of departure from Australia. Visa details can be checked through the Department of Home Affairs website at [www.homeaffairs.gov.au](http://www.homeaffairs.gov.au).

SCV holders who depart Australia become foreign individuals for the purposes of the surcharge unless they meet the ordinary resident test below.

## Ordinary residents

An ordinary resident is a non-Australian citizen who is ordinarily resident in Australia or an external territory. Ordinary residents are not foreign individuals for the purposes of the surcharge.

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<sup>1</sup> Norfolk Island, Christmas Island and Cocos (Keeling) Islands are external territories.

'Ordinarily resident' is not defined in the Act, thus the concept is interpreted according to its ordinary meaning within the context of the legislation. To be ordinarily resident, there must be an element of permanence about where the person lives when compared to somewhere a person might casually or intermittently stay. This does not require physical presence in Australia on the first day of the quarter.

A number of factors are considered in deciding whether a person is an ordinary resident of Australia, including:

- **The period of physical presence in Australia**  
A longer period indicates that a person has established a settled residence in Australia.
- **Intention or purpose for being in Australia**  
Employment or education in Australia is an indicator of the person's intention to live in Australia.
- **Family and business/employment ties**  
Family members living in Australia indicate that the person is more likely to be an ordinary resident.
- **Maintenance and location of assets**  
Bank accounts kept in Australia indicate that the person is more likely to be an ordinary resident.
- **Social and living arrangements**  
Being a member of local sporting club, church group, or volunteer association for example, indicates that a person is more likely to be an ordinary resident.

The ACT Revenue Office will generally accept that a person who occupies an Australian principal place of residence is an ordinary resident of Australia. The meaning of 'principal place of residence' is detailed further in the latest version of Revenue Circular *Principal Place of Residence* (GEN011). All circulars are available at [www.revenue.act.gov.au](http://www.revenue.act.gov.au).

## Foreign corporations

Section 17B of the Act defines a 'foreign corporation' as:

- a corporation incorporated outside Australia; or
- a corporation (incorporated within or outside Australia) in which one or more foreign people hold a controlling interest.

A controlling interest in a corporation exists if, taking their interests together, one or more foreign people or associated people of foreign people:

- are entitled to cast, or control the casting of, 50 per cent or more of the maximum number of votes at a general meeting of the corporation; or
- hold 50 per cent or more of the shares in the corporation.

An interest of exactly 50 per cent is sufficient to constitute a controlling interest.

For the definition of ‘associated person’ see the **Appendix**. The associated person does not have to be a foreign person.

### **Example – foreign corporation**

*A Pty Ltd owns an investment property in Canberra. It has three shareholders: Bruno (30 per cent), Cleo (30 per cent) and D Pty Ltd (40 per cent). Bruno and Cleo are foreign individuals, while D Pty Ltd is an Australian corporation.*

*Bruno and Cleo collectively hold a 60 per cent controlling interest in A Pty Ltd, making A Pty Ltd a foreign corporation.*

### **Foreign governments**

Under part 1 of the dictionary to the *Legislation Act 2001* a corporation includes a body politic (i.e. a government). A foreign corporation therefore includes a foreign government.

A foreign embassy would not ordinarily be liable for the surcharge by operation of the Vienna Convention on Diplomatic Relations.

### **Foreign trusts**

Section 17C of the Act defines a ‘foreign trust’ as follows:

- A trust with fixed beneficial interests is a foreign trust if, taking their interests together, a beneficial interest of 50 per cent or more of the capital of the trust estate is held by one or more foreign people, or associated people of foreign people.
- A discretionary trust (within the meaning of the *Duties Act 1999*) is a foreign trust if a foreign person is named in the trust deed who, under the terms of the trust, takes the capital of the trust estate if there is an exercise of a power or discretion in favour of the person; or a power or discretion is not exercised.

The foreign person named in the trust deed may or may not be the same person as the taker in default of appointment of the trust.

If the trustee of a trust is a foreign individual or corporation in its own capacity, regardless of the nature of the trust, the trustee as owner is a foreign person for the purposes of the surcharge.

### **Example – foreign trust**

*The M Unit Trust has four unitholders: Mona, Mari, Miranda and Mitch. Each person holds 25 per cent of the units in the trust. Mona is a foreign individual. Mari, Miranda and Mitch are Australian citizens, but Mari is Mona’s sister.*

*Mari is an associated person of Mona despite her citizenship status. As exactly 50 per cent of the beneficial interests in the capital of the trust are controlled by Mona and Mari, the trust is a foreign trust.*

## Tracing interests

Interests in a trust or corporation may be traced through a chain of entities. For example:

- Foreign people may hold a controlling interest in a corporation that itself holds controlling interests in other corporations, whether alone or taken together with other foreign people. The corporation is deemed a foreign person for the purposes of determining controlling interests in other corporations.
- Foreign people may hold a controlling interest in a corporation that itself is a beneficiary of a trust, deeming the corporation a foreign person for the purposes of determining a foreign trust.
- A trustee may have a beneficiary that is itself a trustee for another foreign trust, deeming that beneficiary a foreign person for the purposes of determining the first trust's foreign status.

## Notification requirements

Section 14 of the Act requires a relevant person (owner or agent) to tell the Commissioner for ACT Revenue (the Commissioner) of any change in the person's circumstances in relation to the parcel that would cause the surcharge to become payable for the parcel, and the date of the change in circumstances. Notification must be made within 30 days of the relevant change.

Examples of notifiable events include:

- A foreign individual, company or trustee of a foreign trust purchases or acquires an interest in the parcel.
- An individual owner of the parcel becomes a foreign individual, for example if:
  - they cease to ordinarily reside in Australia or an external territory; or
  - they cease to be an Australian citizen or permanent resident.
- A corporate owner of the parcel becomes a foreign corporation, for example, if a foreign person acquires a controlling interest in the corporation.
- A foreign trust is declared in relation to the parcel.
- The parcel is held in a trust that becomes a foreign trust due to a change in the foreign status of the beneficiaries.
- The owners of the parcel cease to be eligible for an exemption previously given to the parcel by the Commissioner.

A failure to comply with section 14 of the Act in relation to the surcharge is a tax default under section 19A of the Act. A tax default may result in the owners being subject to penalty tax and interest in relation to unpaid amounts.

## **Personal representatives**

The surcharge does not apply to a parcel of land owned in the name of a deceased person's personal representative, whether or not the representative is a foreign person. A personal representative is defined as an executor of the deceased person's will or an administrator of the deceased person's estate.

Signed

Kim Salisbury  
Commissioner for ACT Revenue  
6 July 2018

## Appendix: Associated person provisions

### Associated people

'Associated person' is defined by reference to the dictionary to the *Duties Act 1999*, and means a person who is associated with another person in accordance with any of the following provisions:

- people are associated people if they are **Related people**;
- individuals are associated people if they are partners in a partnership to which the *Partnership Act 1963* applies;
- private companies are associated people if common shareholders have a majority interest in each private company;
- trustees are associated people if any person is a beneficiary common to the trusts (not including a public unit trust scheme) of which they are trustees;
- a private company and a trustee are associated people if a related body corporate of the company is a beneficiary of the trust (not including a public unit trust scheme) of which the trustee is a trustee.

### Related people

'Related person' is defined in the *Duties Act 1999* and means a person who is related to another person in accordance with any of the following provisions:

- individuals are related people if:
  - they are partners, or they have been partners and the partnership has ended (whether the partnership ended in Australia or elsewhere); or
  - the relationship between them is that of parent and child, brothers, sisters, or brother and sister;
- private companies are related people if they are related bodies corporate;
- an individual and a private company are related people if the individual is a majority shareholder or director of the company or of another private company that is a related body corporate of the company;
- an individual and a trustee are related people if the individual is a beneficiary of the trust (other than a public unit trust scheme) of which the trustee is a trustee;
- a private company and a trustee are related people if the company, or a majority shareholder or director of the company, is a beneficiary of the trust (other than a public unit trust scheme) of which the trustee is a trustee.