



RESIDENTIAL REAL ESTATE – AUSTRALIAN CORPORATIONS, TRUSTS AND USE OF OTHER PERSONS

Australia's foreign investment framework imposes strict rules around the purchase of residential real estate. The use of Australian corporations, Australian domiciled trusts, or trustees who are Australian citizens or Australian corporations, does not allow foreign persons to avoid these rules.

Corporations and trustees of trusts that meet the definition of a foreign person under the *Foreign Acquisitions and Takeovers Act 1975* (Act) are required to seek foreign investment approval to acquire interests in residential real estate and these applications will be assessed according to the normal rules.

Foreign persons can apply to purchase new dwellings, vacant land for residential development, or established dwellings for redevelopment into multiple dwellings. Foreign persons are generally ineligible to purchase established dwellings as homes, for use as a holiday home or to rent out.

This Guidance Note sets out factors that will be considered when determining whether a corporation or trustee of a trust is a foreign person.

DETERMINING IF A CORPORATION OR TRUSTEE OF A TRUST IS A FOREIGN PERSON

A corporation is considered to be a foreign person if:

- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest in the corporation; or
- two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest.

A trustee of a trust is considered to be a foreign person if:

- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest in the trust; or
- two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest in the trust.

When does a person hold a substantial interest in a corporation or trust?

A person holds a substantial interest in a corporation if the person holds, alone or with one or more associates, an interest of at least 20 per cent in the corporation (for example, voting or shares).

A person holds a substantial interest in a trust (including a unit trust) if the person, alone or with one or more associates, holds a beneficial interest in at least 20 per cent of the income or property of the trust.

A specific rule applies to determining percentages of interests in discretionary trusts and if the trustee of such a trust is a foreign person (see below).

When do two or more persons hold an aggregate substantial interest in a corporation or trust?

Two or more persons hold an aggregate substantial interest in a corporation if the persons, alone or with one or more associates, hold an aggregate interest of at least 40 per cent in the corporation (for example, voting or shares).

Two or more persons hold an aggregate substantial interest in a trust (including a unit trust) if the persons, alone or with one or more associates, hold in the aggregate beneficial interests in at least 40 per cent of the income or property of the trust.

A specific rule applies to determining percentages of interests in discretionary trusts and if the trustee of such a trust is a foreign person (see below).

What is an associate?

The substantial interest test applies to individuals and their associates.

The definition of associate is very broad and includes persons such as:

- any relative, including a person's spouse or de facto, parent, grandparent, brother, sister, child, uncle, aunt, nephew, niece, lineal descendent or adopted child;
- any entity of which a person is a senior officer (for example, a director of a corporation or a person who is in a position to determine the investments or policy of the trustee);
- if the person is a corporation—a person who holds a substantial interest in the corporation; or
- the trustee of a trust in which a person holds a substantial interest.

It also includes any entity whose senior officers are accustomed or under an obligation to act in accordance with the directions, instructions or wishes of the person. There are additional associates in relation to interests in residential land (subsection 6(2) of the Act).

Example 1

Margaret holds a 15 per cent interest in Abode Developments and is a director of the company. Although Margaret does not hold a substantial interest in Abode Developments (as she holds less than 20 per cent of the shares in the corporation), Margaret and Abode Developments are associates as Margaret is a senior officer as defined in the Act.

Example 2

Nadia is a 15 year old foreign person residing in Australia for six months through a secondary school exchange program. Nadia's parents, who live in a foreign country, are proposing to purchase an established dwelling for Nadia's benefit by establishing a trust where Nadia is the sole beneficiary with an Australian citizen being appointed as the trustee. The trustee of the trust is considered to be a foreign person in their capacity as trustee (as an individual not ordinarily resident in Australia holds a beneficial interest in at least 20 per cent of the income or property of the trust). The trustee will be required to seek approval to purchase residential real estate such as new dwellings in Australia. However, an application to purchase an established dwelling would generally not be approved, as a trustee of a trust which is a foreign person would normally be ineligible to purchase an established dwelling to live in or rent out.

There are some limited situations where a person will not be considered an associate of another person merely because of the fact that the person is involved in a particular activity. For more information, see Guidance Note 32.

Discretionary trusts

Under Australia's foreign investment framework, the trustee of a discretionary trust where one or more foreign persons hold any beneficial interest in the trust is generally considered to be a foreign person in their capacity as trustee of the trust. This is because the trustee of a discretionary trust has the power to distribute the income or the property of the trust to one or more beneficiaries, such that one person, who may be a foreign person, can have all the income of the trust distributed to them or receive all the assets of the trust.

Example 3

A discretionary trust is established in Australia and the trustee is an Australian citizen. Four individuals hold a beneficial interest in the trust, as potential beneficiaries of any of the income or property of the trust. One of those individuals is not ordinarily resident in Australia and is not an Australian citizen, and the others are Australian citizens. The individual who is not ordinarily resident in Australia is a foreign person and taken to have a 100 per cent interest in the trust (irrespective of how the trustee may exercise his or her discretion in practice). The trustee of the trust is a foreign person for the purposes of Australia's foreign investment framework. The trustee therefore needs to apply for and receive approval for any proposed purchase by the trust of residential land.

ESTABLISHED DWELLINGS FOR AUSTRALIAN BASED EMPLOYEES

Foreign persons that operate a substantial Australian business may apply to purchase established dwellings to house their Australian based employees. Eligible applications are normally approved subject to conditions, including that the dwelling is sold if it is expected to remain vacant for more than six months. Whether a foreign person is eligible to purchase an established dwelling for employee accommodation is subject to a number of factors.

For more information, see Guidance Note 7.

USE OF OTHER PERSONS TO PURCHASE RESIDENTIAL REAL ESTATE

Under Australia's foreign investment framework, Australian citizens, permanent residents, exempt foreign persons, and foreign persons who are eligible for approval may be subject to strict penalties if purchasing a dwelling on behalf of, or for the benefit of, a foreign person (including family members) who has either:

- not received approval to purchase the dwelling or the interest in the dwelling; or
- would generally be ineligible to purchase the dwelling or the interest in the dwelling.

The foreign person on behalf of who an interest is acquired may also have breached the rules and be subject to penalties. An interest in residential real estate is defined broadly to include any legal or equitable interest in the land, including when a person has any right to have the interest transferred to himself or herself, and despite the manner in which the interest arose.

The Act also allows for the tracing of interests through multiple entities to help determine who the ultimate acquirer of the interest in the dwelling is. The Treasurer, or his or her delegate, may issue a tracing notice to a person requiring further information about ownership of a dwelling. Failure to comply with a tracing notice may attract a penalty of imprisonment for up to six months or 30 penalty units (\$6,300), or both.

SCHEMES AND ANTI-AVOIDANCE

The Treasurer has a wide range of powers to take action to penalise persons and their associates who are involved in a scheme for the sole or dominant purpose of avoiding the Act. This includes issuing of disposal orders requiring that an interest in a dwelling acquired by a person involved in a scheme be sold to an eligible independent party.

The Treasurer may make an order specifying that certain persons involved in a scheme to avoid the Act are taken to be associates for specified purposes.

PENALTIES

Strict penalties (including civil and criminal penalties) may apply for breaches of Australia's foreign investment framework. For more information, see Guidance Note 11.

Cases of non-compliance with Australia's foreign investment framework may also be brought to the attention of law enforcement agencies and other Commonwealth departments such as the Department of Immigration and Border Protection.

FEES

An application for approval to purchase residential property will not be considered until the relevant application fee has been paid in full.

For more information on fees, see Guidance Note 29.

HOW TO APPLY

If you would like to apply for foreign investment approval for:

- A new dwelling
- Vacant residential land
- A second hand or established dwelling
- An exemption certificate for established dwellings
- An exemption certificate for residential land (other than established dwellings)

Please use the [Australian Taxation Office's foreign investment application form](#).

Foreign persons should take care to ensure they supply the correct details and all required information as part of their application, as changes to details such as name or property address after an approval has been granted may require foreign persons to seek a new approval and to pay further fees.

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.