

# Guideline

## Foreign Investor Duty Surcharge Meaning of Foreign Person

### Background

The Foreign Investor Duty Surcharge (FIDS) is an additional amount of duty charged under the *Duties Act 2001* when residential or primary production property is acquired, directly or indirectly, by a foreign person.

### Direct acquisition

A direct acquisition occurs when the land being acquired is transferring to a foreign person (which includes a foreign corporation or trustee of a foreign trust - see below). These are assessed under Chapter 2 of the Duties Act.

### Indirect acquisition

An indirect acquisition occurs if a significant interest in a land owning company or trust is acquired, or where a land use entitlement is acquired by way of allotment of shares or issue of units. These are assessed under Chapter 3 of the Duties Act.

### FIDS charge

FIDS is charged on the dutiable transaction as an additional duty of:

- 3.0 per cent on the proportion of the dutiable value of residential property directly or indirectly acquired by a foreign person; and
- 0.5 per cent on the proportion of the dutiable value of primary production property directly or indirectly acquired by a foreign person.

The surcharge applies to transactions that occur **on or after 1 July 2018**.

FIDS is not payable if the underlying transaction is exempt, or the transaction is eligible for a concession under Part 5 of the Duties Act. An exception to this is if the transaction is eligible for a concession under section 50 in which case FIDS is payable.

### Definition of a foreign person

A foreign person is:

- a foreign natural person;
- a foreign corporation; or
- a trustee of a foreign trust.

## Foreign natural person

A foreign natural person means a natural person who is not:

- an Australian citizen within the meaning of the *Australian Citizenship Act 2007* of the Commonwealth;
- the holder of a permanent visa within the meaning of the *Migration Act 1958* of the Commonwealth;
- a New Zealand citizen who is the holder of a special category visa within the meaning of the *Migration Act 1958* of the Commonwealth.

## Australian citizen

An Australian citizen is not required to provide proof of their citizenship when a transaction is lodged, simply declaring Australian citizenship in the transaction is sufficient.

## Permanent Visa

A person can become a permanent resident of Australia by applying for and being granted a permanent visa (PV), which allows them to remain in Australia indefinitely.

Non-Australian citizens need to provide documentary evidence of their PV. The quickest way to obtain this evidence is via the Department of Home Affairs 'Visa Entitlement Verification Online' (VEVO) system. VEVO provides a printable summary of a person's visa details and conditions. The SRO will accept a summary statement obtained from VEVO, relevant to the transaction date, as evidence of a person's visa status. For questions about VEVO, please contact the [Department of Home Affairs](#).

## New Zealand Special Category Visa

A Special Category Visa (SCV) (subclass 444) is generally issued to New Zealand citizens on entry to Australia, subject to them meeting certain health and character requirements. The visa ends on the date of departure from Australia.

New Zealand citizens who hold a SCV will need to provide documentary evidence of their SCV. The quickest way to obtain this evidence is via VEVO (as discussed in the 'Permanent Visa' section above).

If a person is the holder of a SCV as at the transaction settlement date, they are not deemed to be a foreign natural person for the purposes of the *Duties Act 2001*, therefore FIDS will **not** be applied. However, on leaving Australia, even for short periods, a SCV expires. If a person with a SCV departs Australia:

- within 3 years after the settlement date of a transaction; and
  - the New Zealand citizen still holds an interest in the relevant property,
- they will need to notify the Commissioner of State Revenue within 14 days of the SCV ending.

The transaction would be reassessed and FIDS would be applied.

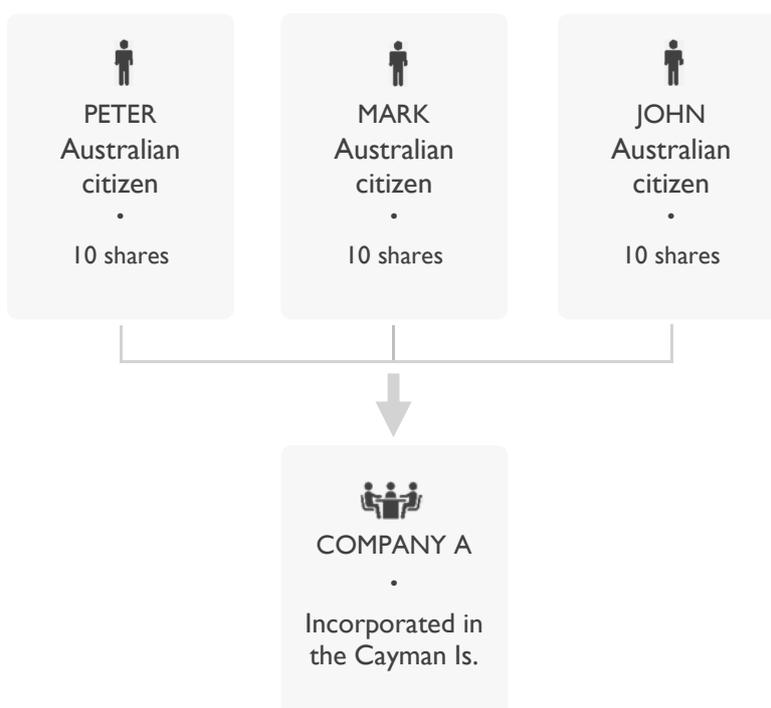
## Foreign Corporation

A corporation is foreign if it is:

- incorporated outside of Australia; or
- a corporation in which foreign persons have a significant interest.

There is a presumption that all corporations are foreign under the Duties Act unless proven otherwise. Therefore, for FIDS not to apply, it is necessary to prove the corporation is not foreign. This will require a careful examination of the corporation's share structure and voting powers tracing back through various corporate or trust structures where necessary.

### EXAMPLE 1 - FOREIGN CORPORATION (Corporation incorporated outside of Australia)



❗ Even though all shareholders in Company A are Australian citizens, Company A is a **Foreign Corporation** because it is incorporated in the Cayman Islands.

### Significant interest in a corporation

An Australian-incorporated company is taken to be a foreign corporation unless proven otherwise. For FIDS not to apply, the company would need to establish that foreign persons do not have a significant interest in the company. Foreign persons have a significant interest in a corporation if, taking their interests in aggregate, one or more foreign persons:

- a) are in a position to control 50 per cent or more of the voting power in the corporation; or
- b) are in a position to control 50 per cent or more of the potential voting power in the corporation; or
- c) have an interest in 50 per cent or more of the issued shares in the corporation.

## Voting power, and potential voting power

Under the Duties Act:

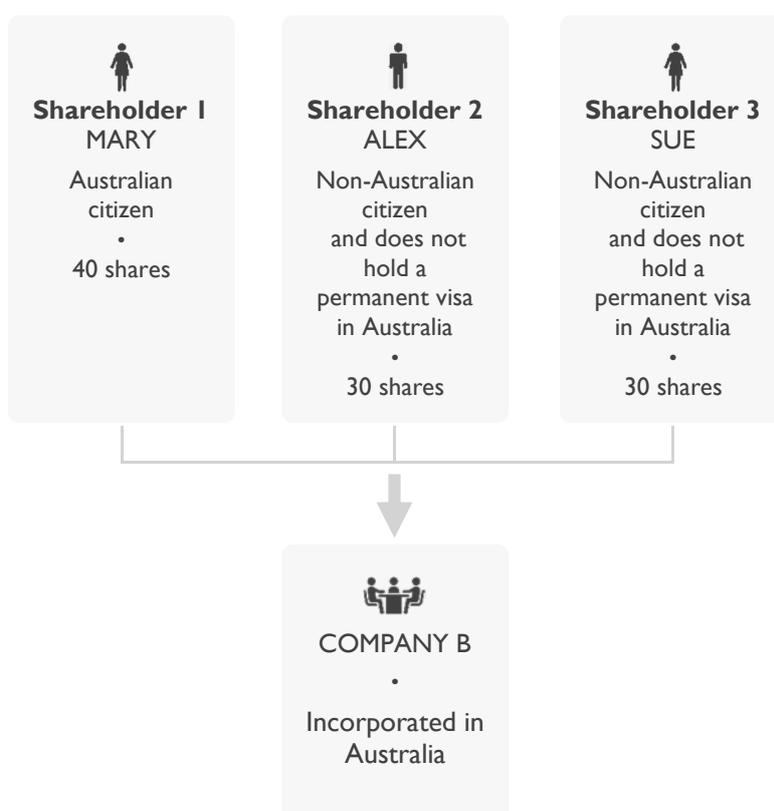
**potential voting power** has the same meaning as in section 22 of the *Foreign Acquisitions and Takeovers Act 1975* of the Commonwealth;

**voting power** has the same meaning as in the *Foreign Acquisitions and Takeovers Act 1975* of the Commonwealth.

Generally, voting power is the maximum number of votes that might be cast at a general meeting. Potential voting power in an entity is the potential exercise of rights to vote at a general meeting.

A careful examination may be required of the share register, company Constitution and other relevant documents to establish the types of shares on issue, voting and potential voting power held.

### EXAMPLE 2 - FOREIGN CORPORATION (Australian company with shareholders who are natural persons)



⚠ Company B is incorporated in Australia and it has 100 shares issued.

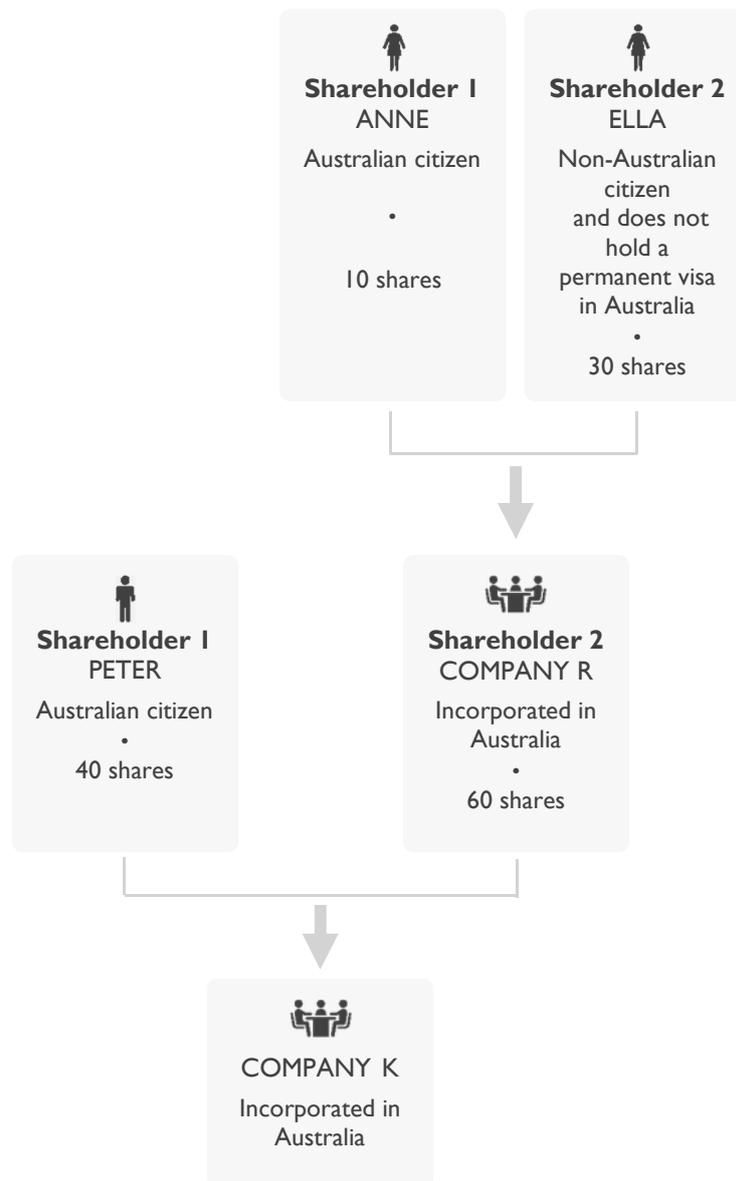
The company has three shareholders:

- i) Mary, an Australian citizen who holds 40 shares;
- ii) Alex, a foreign natural person who holds 30 shares; and
- iii) Sue, a foreign natural person who holds 30 shares.

Between them, Alex and Sue have 60 out of the possible 100 shares.

Although Company B is incorporated in Australia, it is a **Foreign Corporation** because foreign persons are holders of 50 per cent or more of the shares, and have a significant interest in the company.

### EXAMPLE 3 - FOREIGN CORPORATION (Australian company with mixed shareholders)



❗ Company K is incorporated in Australia and it has 100 shares issued.

The company has two shareholders:

- i) Peter, an Australian citizen who holds 40 shares; and
- ii) Company R, which holds 60 shares.

Because Company R has more than 50 per cent of the shares in Company K, it needs to be determined if Company R is a Foreign Corporation. Its shareholders are Anne and Ella. Ella holds 30 (75 per cent) of the 40 shares in Company R, and she is a foreign natural person.

Because Ella is a foreign person, and has a significant interest in Company R, Company R is a Foreign Corporation.

Consequently, because Company R holds 60 per cent of the shares in Company K, Company K is a **Foreign Corporation**.

## Foreign Trustees

For the purposes of the Duties Act, a foreign person includes a “foreign trustee”. A foreign trustee is any person (natural or corporate) who holds, agrees to hold, or has acquired, dutiable property on trust for a **foreign trust**. In this regard, it is irrelevant whether the trustee is a foreign person in its own right.

There is a **presumption** under the Duties Act that all trusts are taken to be **foreign** unless proven otherwise. Therefore, it is necessary to consider whether a trust is foreign - this will require careful examination of the trust deed and any amendments thereto.

### What is a foreign trust?

A foreign trust is a trust in which a foreign natural person, foreign corporation, or a foreign trustee has a substantial interest in the trust estate. Foreign persons have a substantial interest in the trust estate if, taking their interests in aggregate, one or more foreign persons have a beneficial interest of 50 per cent or more in the capital of the estate of the trust.

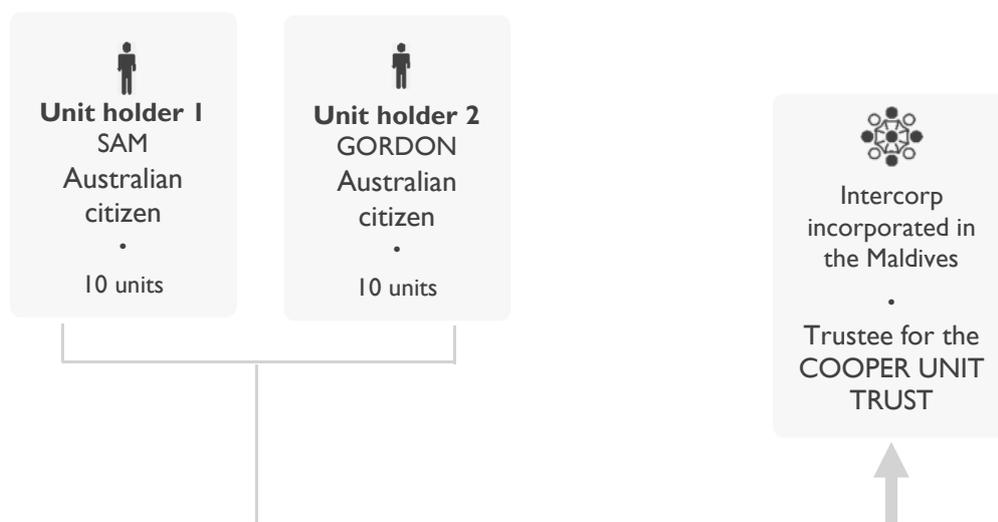
To rebut the presumption that a trust is foreign, it is necessary to determine that foreign persons do not have a beneficial interest of 50 per cent or more in the capital of the trust estate. In determining the extent of the beneficial interest held, it may be necessary to trace through the beneficiaries to determine whether ultimately a substantial interest is held.

If the trustee of a trust has any discretion in regard to the distribution of capital from the trust (e.g. if the trustee may choose which beneficiary or class of beneficiary will receive a distribution), each beneficiary to whom a distribution is capable of being made is taken to have a beneficial interest in the maximum percentage of capital that the trustee is empowered to distribute to that beneficiary.

When determining if a trust is foreign it is necessary to examine the trust deed and list of beneficiaries to determine who has a substantial interest in the trust. It is irrelevant if the trustee is a foreign natural person or foreign corporation.

### EXAMPLE 4 - TRUSTS

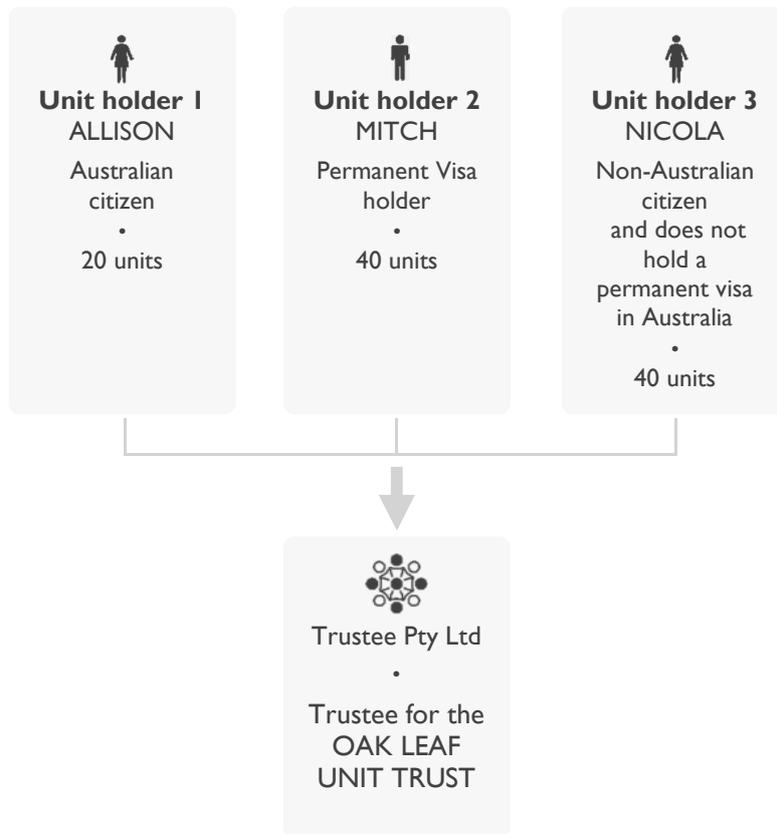
*(Unit trust with Australian citizen unit holders - trustee not incorporated in Australia)*



Even though the trustee of the trust was not incorporated in Australia, the trust is **not a Foreign Trust**. All the beneficiaries are Australian Citizens therefore no foreign person has a substantial interest in the capital of the trust.

## EXAMPLE 5 - TRUSTS

*(Unit trust with unit holders who are natural persons)*



Trustee Pty Ltd, as trustee for the Oak Leaf Unit Trust, purchases property in Tasmania. There are 100 units held in the Trust and, under the trust deed, the unit holders have a right to the capital of the trust estate in proportion to the units held.

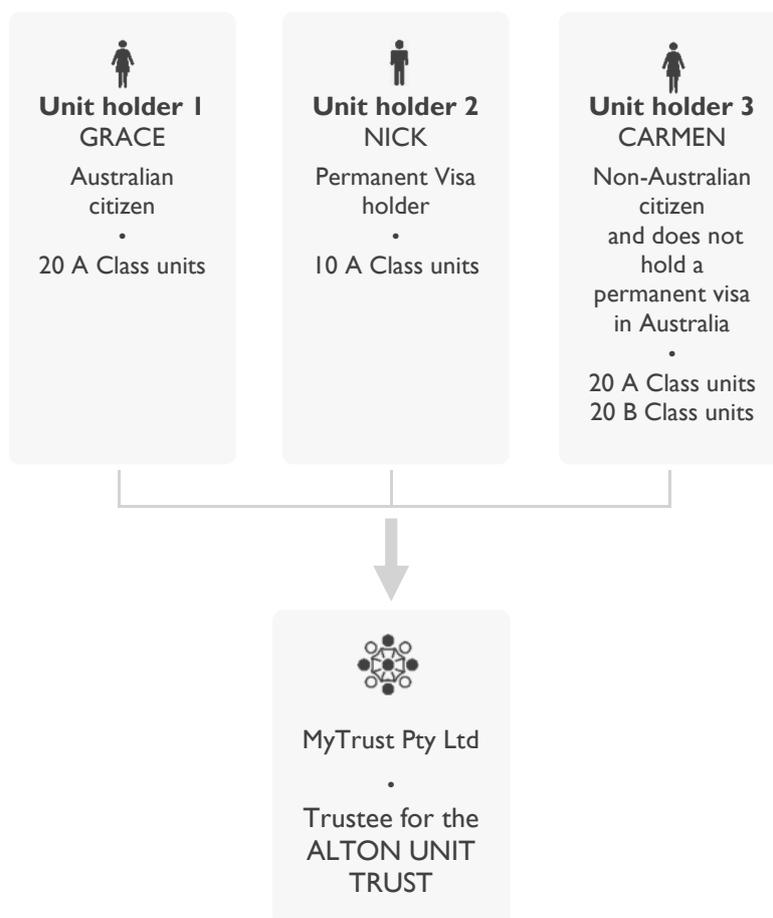
The Trust has three unit holders who are all natural persons. Nicola is the only foreign unit holder.

The Trust is **not** a **Foreign Trust** because Nicola (the foreign unit holder) does not have an interest in 50 per cent or more of the capital of the trust.

Nicola's interest corresponds to 40 per cent of the capital of the trust.

## EXAMPLE 6 - TRUSTS

*(Unit trust with unit holders who are natural persons holding differing unit types)*



 MyTrust Pty Ltd, as trustee for the Alton Unit Trust, purchases property in Tasmania.

There are 70 units held in the Trust comprising:

- 50 A Class units attach the right to the capital of the trust estate in proportion to the number of A Class units held; and
- 20 B Class units give the unit holder a right to the distribution of income of the Trust (but not to capital).

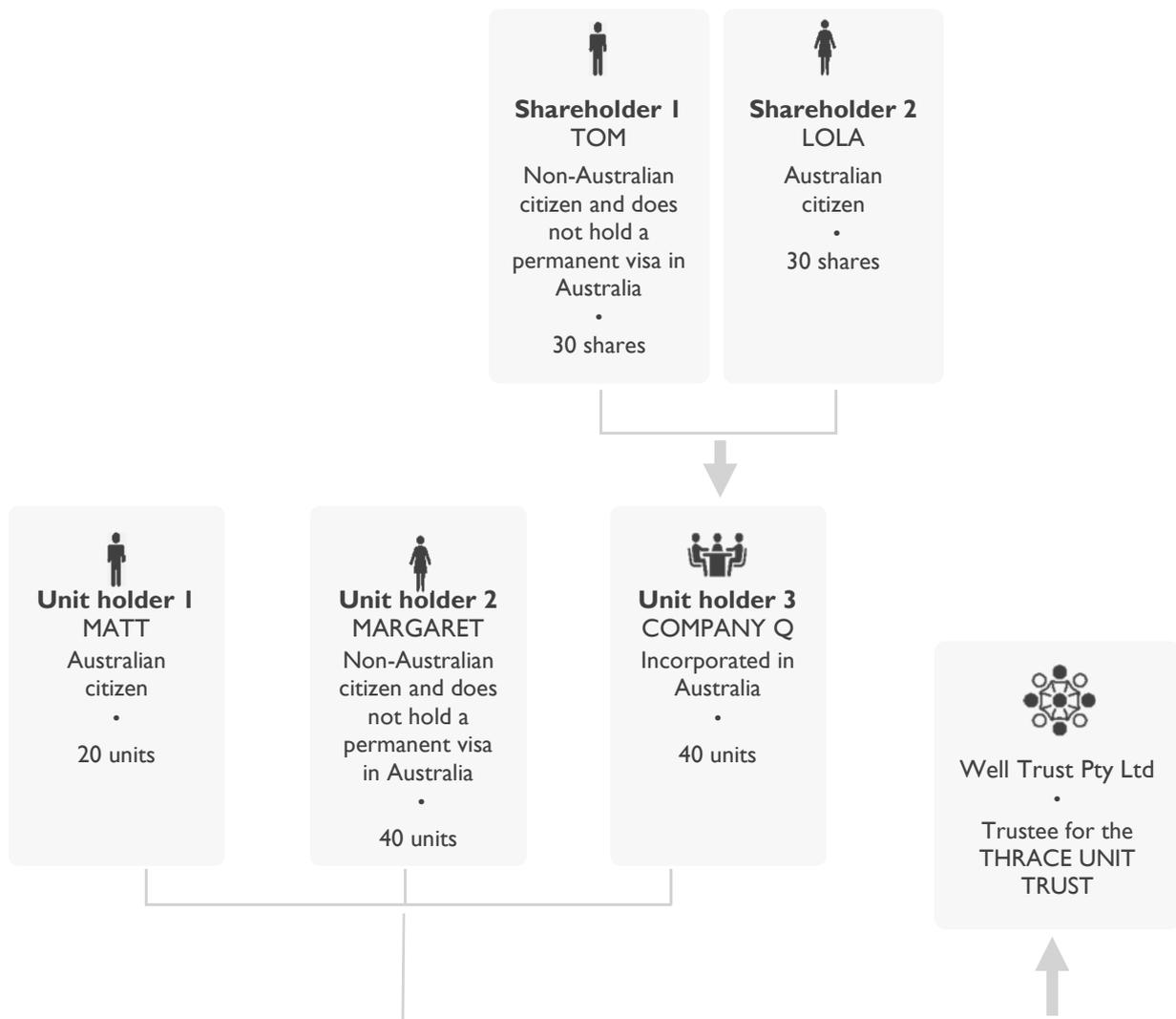
The Trust has three unit holders, all of whom are natural persons.

Carmen (the only foreign unit-holder) holds 20 A Class units and 20 B Class units out of the possible 70. While she has more than 50 per cent of the total units in the trust, she only holds 40 per cent of the A Class units, which are entitled to capital distributions.

The Trust is **not a Foreign Trust** because Carmen (the foreign unit-holder) does not have an interest in 50 per cent or more of the capital of the trust.

## EXAMPLE 7 - TRUSTS

*(Unit trust with mixed unit holders)*



**!** Well Trust Pty Ltd, as trustee for the Thrace Unit Trust, purchases property in Tasmania. There are 100 units held in the Trust and under the trust deed, the unit holders have a right to the capital of the trust estate in proportion to the units held.

The Trust has three unit holders:

- Matt (an Australian citizen) holds 20 units;
- Margaret (a foreign person) holds 40 units;
- Company Q holds the remaining 40 units.

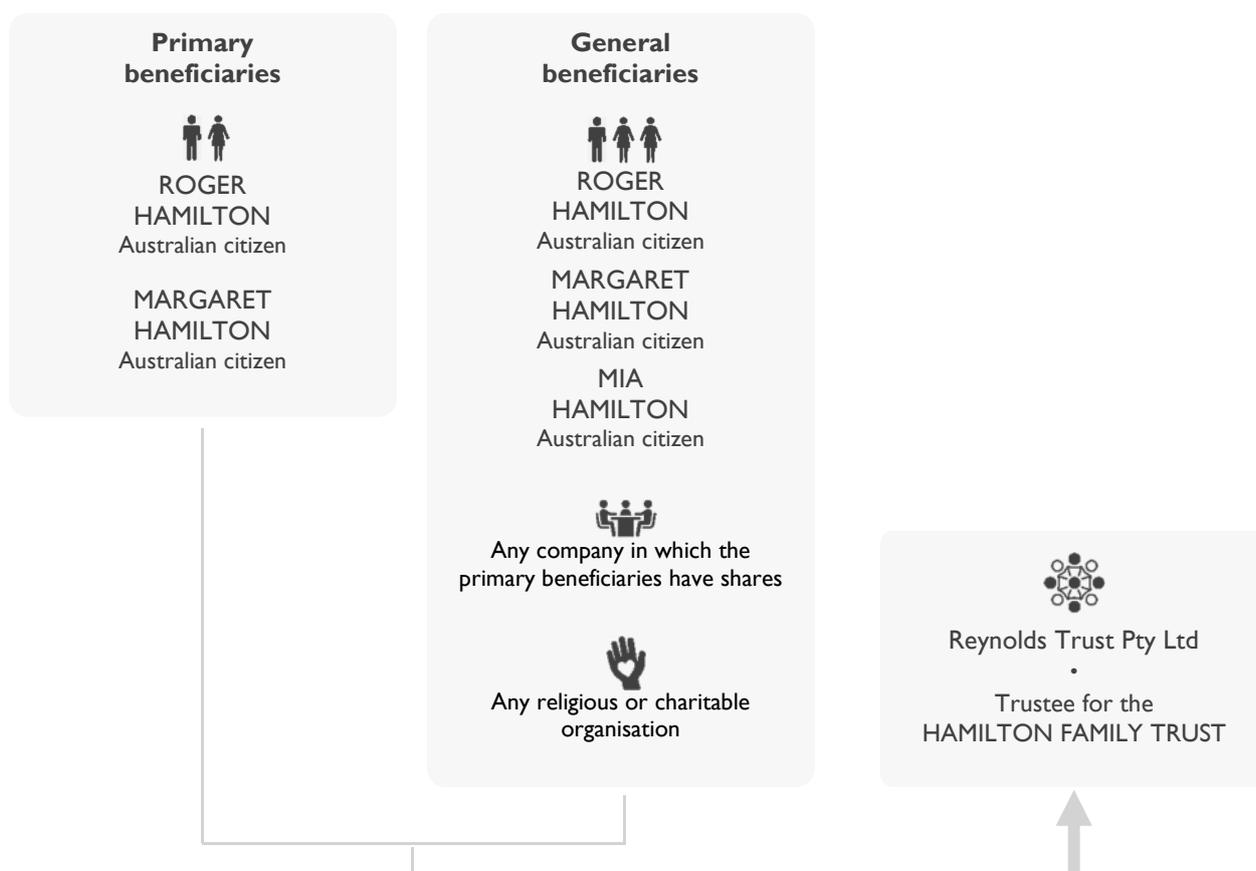
Company Q is incorporated in Australia. It has two shareholders that have 50 shares each. Tom is a foreign natural person and holds 50 per cent of the shares in Company Q. Because Tom holds a significant interest in the company (i.e. 50 per cent or more of the issued shares), Company Q is a Foreign Corporation for the purposes of the Duties Act.

As Company Q is a Foreign Corporation, the Thrace Unit Trust is a **Foreign Trust** because Company Q's units, aggregated with Margaret's units would result in 80 per cent of the interest in the capital of the trust being held by foreign persons.

## Are discretionary trusts foreign trusts?

All trusts are taken to be foreign unless proven otherwise. A trustee of a discretionary trust generally has a power or discretion to distribute the capital of the trust estate to a person or a member of a class of persons. Under the Duties Act, any such person is taken to have a beneficial interest in the maximum percentage of the capital of the trust estate that the trustee is empowered to distribute to that person. This means that any discretionary trust that has any potential foreign beneficiaries remains a foreign trust if 50 per cent or more of the capital of the trust is capable of being distributed to a foreign beneficiary.

### EXAMPLE 8 - TRUSTS (Family trust - trustee's wide discretions)



⚠ Reynolds Trust Pty Ltd, as trustee for the Hamilton Family Trust, purchases property in Tasmania. The Trust has named primary beneficiaries as well as general beneficiaries; some are named beneficiaries and others fall into a class of beneficiaries.

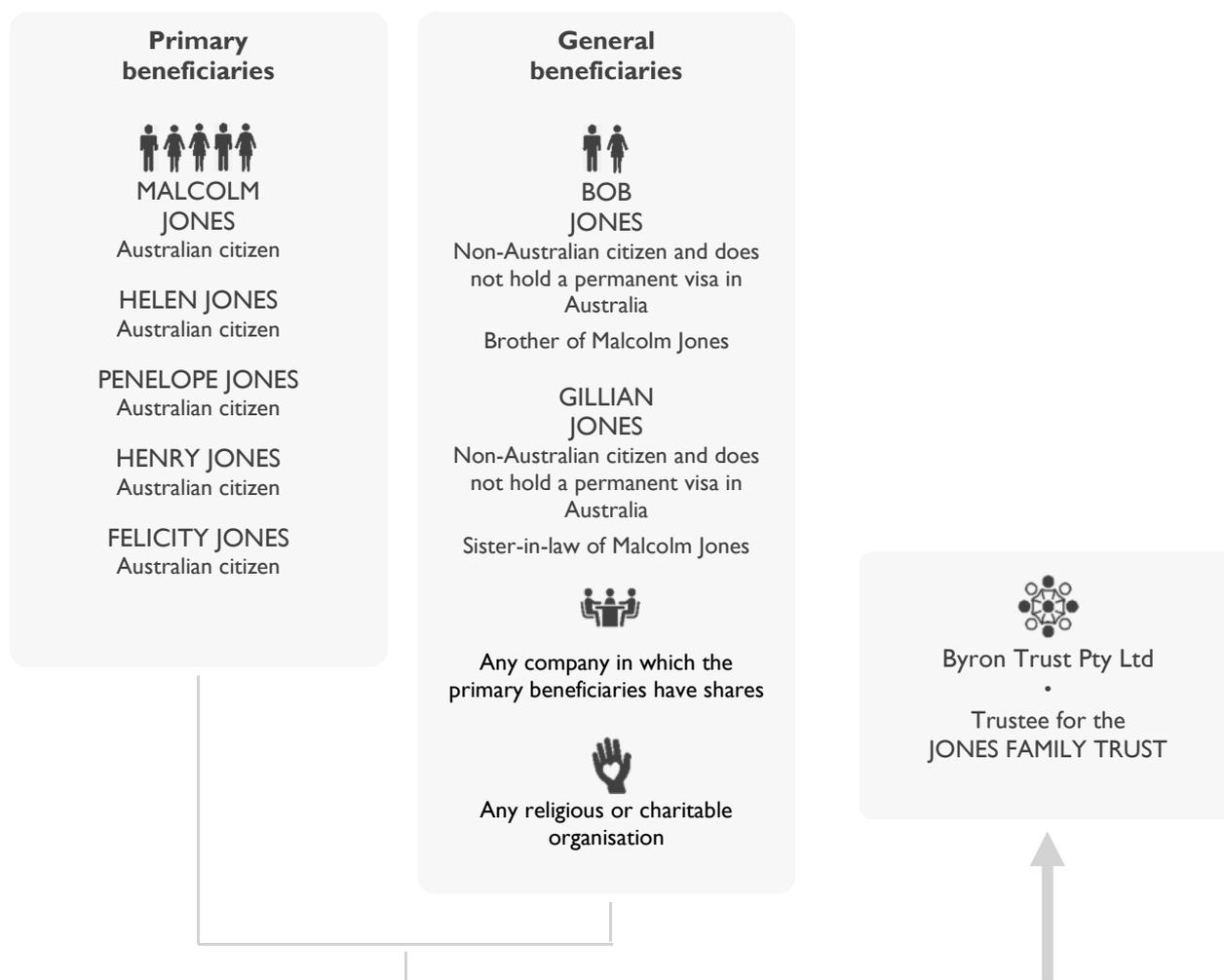
The trustee has wide powers to distribute all income and capital of the Trust to either the primary beneficiaries or general beneficiaries. All the named beneficiaries are members of the Hamilton family who are Australian citizens. The general beneficiaries include 'Any religious or charitable organisation', which could include foreign companies or trusts. Because the trustee could distribute the whole of the capital to a foreign organisation, the Hamilton Family Trust is a **Foreign Trust**.

## Family Trusts

Most family trusts are discretionary trusts. They may list the immediate family members as primary beneficiaries and may also include a wide class of general beneficiaries.

A trustee under a discretionary family trust generally has a power or discretion to distribute the capital of the trust estate to a person or a member of a class of persons. Because all trusts are taken to be foreign unless proven otherwise, it is necessary to examine the trust deed to prove that foreign persons don't have a substantial interest in the capital of the trust.

### EXAMPLE 9 - TRUSTS (Family trust - trustee's limited discretions)

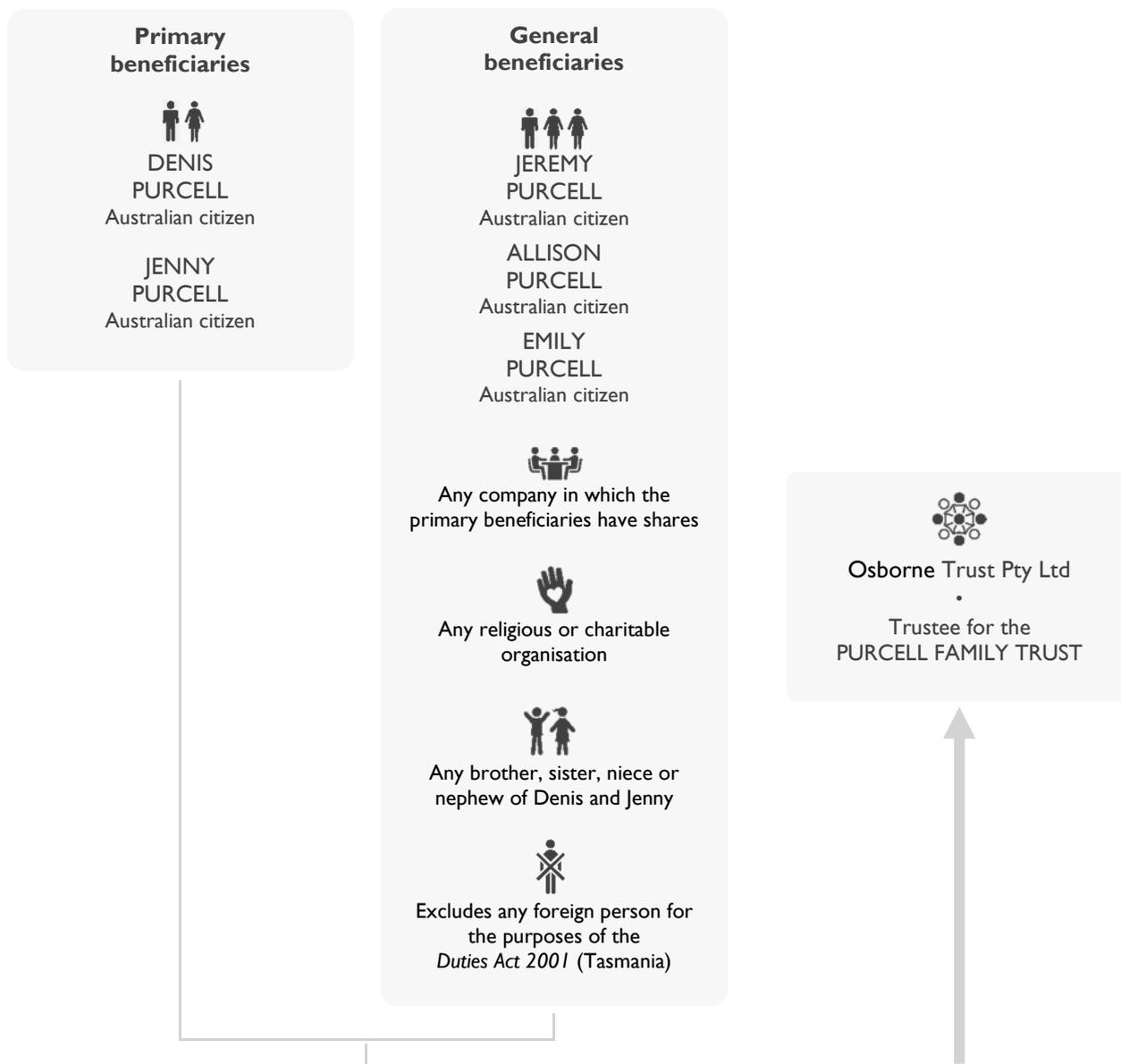


**!** Byron Trust Pty Ltd as trustee for the Jones Family Trust purchases property in Tasmania. The trust has named primary beneficiaries and general beneficiaries, some of which are named beneficiaries, and others that fall into a class of beneficiaries. The trustee has powers to distribute capital to primary beneficiaries, but can only distribute income to the general beneficiaries.

The primary beneficiaries are all members of the Jones family and are Australian citizens. The general beneficiaries include Bob and Gillian who are not Australian citizens. While the trust has foreign persons who are beneficiaries, the trustee cannot distribute capital to those foreign persons and therefore the trust is **not** a Foreign Trust.

## EXAMPLE 10 - TRUSTS

(Family trust - trustee's wide discretions but with exclusions)



 Osborne Trust Pty Ltd as trustee for the Purcell Family Trust purchases property in Tasmania. The trust has named primary beneficiaries and general beneficiaries, some of which are named beneficiaries, and others that fall into a class of beneficiaries.

The trustee has power to distribute income and capital to both the primary beneficiaries and general beneficiaries. The named beneficiaries are members of the Purcell family and all are Australian citizens. The general beneficiaries include 'Any brother, sister, niece or nephew of Denis and Jenny'. In the above example, Denis has a brother, John, who is a foreign person.

The trust contains a clause that excludes a distribution of any capital to any beneficiary who is a foreign person for the purpose of the Tasmanian Duties Act. While John is a foreign person, because of the exclusion clause, the trustee cannot distribute any of the capital to a foreign person. Therefore, the Purcell Family Trust is **not** a Foreign Trust.

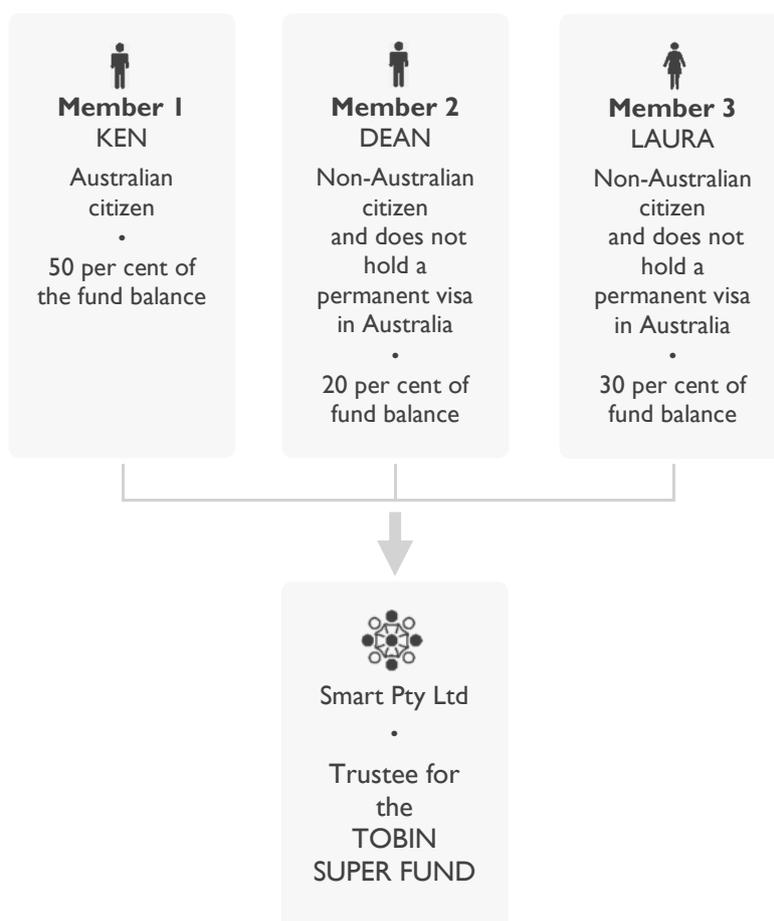
## Are superannuation fund trusts foreign trusts?

All trusts are taken to be foreign unless proven otherwise. Like any trust, it is necessary to provide evidence that a foreign person (or persons) does not have a substantial interest in the capital of the trust estate in order to establish that the trust is not foreign.

It will be necessary to examine the members of the superannuation fund and to determine the interest they hold in the fund. A member's interest in the capital of the fund will depend upon the specific terms of the superannuation fund deed, but generally will be proportional to the member's account balance. Like any other trust, it is necessary to prove a trust is not foreign, which will require careful examination of the trust deed.

### EXAMPLE 11 - TRUSTS

*(Superannuation funds with Australian and foreign members)*



ⓘ Smart Pty Ltd as trustee for the Tobin Super Fund purchases property in Tasmania. Ken, Dean and Laura are the members of the fund.

Dean and Laura are foreign natural persons who have a combined interest in the fund of 50 per cent, being a substantial interest in the trust.

Therefore, the Tobin Super Fund is a **Foreign Trust**.

## Frequently Asked Questions

**Q. I emigrated from the United Kingdom to Australia as a child in the 1960s. I have not left Australia since arriving here, and have always worked and paid taxes in Australia. Do I have to pay FIDS?**

A. You would need to provide evidence that you are a permanent visa holder. If you do not have such evidence, you would need to contact the Department of Home Affairs. If you choose not to provide evidence of your permanent visa, you will be liable to pay FIDS.

**Q. I have a trust with broad classes of beneficiaries, which could include foreign persons, but I do not intend to distribute to a Foreign Person. Is my trust a Foreign Trust?**

A. Yes. Because all trusts are taken to be foreign trusts, and the onus is on the taxpayer to prove otherwise. If a foreign person has a substantial interest in the capital of the trust, the trust is a foreign trust, even if you do not intend to distribute capital to a foreign person.

**Q. I have a trust that has a large number of beneficiaries. Is it necessary to identify every potential beneficiary when it is unlikely that all the beneficiaries will get a distribution from the trust?**

A. Yes. Because all trusts are taken to be foreign trusts, and the onus is on the taxpayer to prove otherwise. Complex tracing may be required for some trust structures.

**Fixed trusts:** With unit trusts for example, it might be more practical to establish that Australian citizens hold a substantial interest in the trust.

**Discretionary trusts:** It will be necessary to establish that no foreign person has a substantial interest in the trust capital.

**Q. I am an Australian citizen and a member of a superannuation fund and hold a 60 per cent interest in the fund. I have nominated my death benefit go to a foreign person - does that make the trust subject to FIDS?**

A. No. While someone may nominate a death beneficiary, the nominated person is not considered a beneficiary of the fund while the member is alive.

**Q. My trust has broad classes of beneficiaries. However, it has an exclusion clause, excluding any foreign person from receiving capital of the trust for the purpose of the Duties Act (NSW) and the Duties Act (Vic). It also has a general exclusion clause to remove the power of the trustee to distribute capital to a foreign person as defined in any corresponding Duties legislation of any other state or territory in Australia. Is this sufficient to make the trust not foreign?**

A. Yes, because of the exclusion clause, the trustee cannot distribute any of the capital to a foreign person. While the trust deed does not specifically mention the Duties Act of Tasmania the general exclusion clause removes the power of the trustee to distribute capital to a foreign person as defined in any corresponding Duties legislation. As the Duties Act of Tasmania is corresponding legislation, the clause excludes foreign persons for the purpose of the Duties Act.

**Q. My trust has broad classes of beneficiaries. However, it has a general exclusion clause to remove the power of the trustee to distribute capital to a foreign person for the purpose of the Duties Act (NSW) and the Duties Act (Vic), but not including Tasmania. Is this sufficient to make the trust not foreign?**

A. No. The onus is on the taxpayer to prove that a trust is not foreign. Because the statutory definitions across the various Australian jurisdictions can vary, the taxpayer would need to establish that a Foreign Person does not have a substantial interest in the capital of the Trust. This may require the analysis of the definitions in the provisions in the Tasmanian legislation, comparing these with the definitions relevant to the state or territory legislation referred to in the deed, as they contain differences and are subject to legislative amendment. Analysis would be required to be provided to the SRO for evidence that the trust is not a Foreign Trust.

**Q. I have entered into a contract for my family trust (which is a Foreign Trust) to purchase residential property in Tasmania. Can I amend my trust before settlement so that I do not have to pay FIDS?**

A. The application of FIDS is determined at the time of the dutiable transaction. Therefore, should a trust be amended before settlement so that it is no longer a Foreign Trust, FIDS will not apply.

Any amendment is subject to other considerations, for example, does the trustee actually have the power to amend. A careful examination of the trust deed should be made to ensure any amendment is capable of being made and does not resettle the trust.

An amendment of a trust deed after a contract is entered into, but before settlement, to remove the ability to distribute capital to foreign persons would not, in and of itself be generally considered by the SRO to activate the anti-avoidance provisions.

**Q. The trustee of my trust is a corporation that was not incorporated in Australia. Does that make my trust foreign?**

A. Not necessarily. An entity is a foreign trustee only if it is the trustee of a Foreign Trust. If it is established that foreign persons do not have a substantial interest in the capital of the trust, then the trust will not be considered foreign.

**Q. Do I have to prove a trust is not foreign if the dutiable transaction is not related to residential or primary production property?**

A. No. FIDS applies to the purchase of land that is, or is intended to be, used as residential or primary production land. The State Revenue Office will determine the application of FIDS based on the property type and intended use of the land.

If you are the representative for a taxpayer, it may be prudent to obtain proof of whether the purchaser is foreign or not so that you can advise your client of current or future FIDS implications.

**Q. I am a foreign citizen who purchased a commercial property 14 months ago but am now converting it to a residence. Am I liable for FIDS?**

A. Yes.

If, within three years of its purchase:

- land that was not residential or primary production land subsequently becomes residential or primary production land, or
  - land which was primary production land becomes residential land,
- the surcharge, or an additional amount of FIDS, may become payable.

The Commissioner of State Revenue must be notified within 14 days of land changing to residential or primary production land if:

- the change occurs within three years of its purchase, and
- one or more of the purchasers was a foreign person who remains an owner at the time the land use changes.