



EXCLUDING FOREIGN PERSONS FROM YOUR TDT

In recent years, both the Federal and State Governments of Australia have taken measures to restrict foreign investment into Australia, particularly in relation to residential property.

Some of the ways that Governments are discouraging foreign investment are:

- Additional stamp duty surcharges paid by purchasers who are foreign persons
- Additional annual land tax surcharges for foreign owners
- Requiring foreign purchasers to apply for approval before making particular purchases (with a significant application fee payable)
- Withholding sales proceeds for foreign sellers, as protection to guarantee a foreign seller pays their capital gains tax bill

HOW ARE AUSTRALIAN TRUSTS IMPACTED BY THE FOREIGN INVESTMENT RESTRICTIONS?

In addition to imposing the above requirements on foreign persons, Australian Governments are also targeting investment vehicles like Australian trusts and companies, to ensure that foreign investors are not exploiting these vehicles to make back door acquisitions.

It's therefore important to ensure that any testamentary discretionary trusts (**TDTs**) that we establish under your estate plan are not inadvertently caught by these regimes.

When it comes to trusts (including TDTs), the foreign investment restrictions require us to take a proactive approach to ensure that your TDT can never benefit a foreign person.

Unfortunately, it is irrelevant whether any actual beneficiaries of the TDT are foreign persons.

If your TDT will inherit residential property, it will need to specifically exclude foreign persons from being able to benefit from the TDT.

The people who are able to benefit from the TDT are called “beneficiaries”.

If your TDT does not exclude foreign persons from being beneficiaries, then it will be treated as being a foreign person when it acquires Australian residential property, even if:

- **there are no actual foreign persons who are beneficiaries; or**
- **the residential property is gifted to the TDT via an inheritance**

This can be very expensive and erode the inheritance passing to your loved ones.

For example, the current fee to apply for approval from the Foreign Investment Review Board for a foreign person (including a TDT that is treated as a foreign person because it doesn't exclude foreign persons from its beneficiaries) to acquire a property that is valued between \$1 million and \$2 million is \$88,000.

This fee is a non-refundable application fee only and does not guarantee that approval will be granted.

WHO IS A “FOREIGN PERSON”?

While the exact definitions of a “foreign person” differ between State and Federal Governments, a person is generally considered a foreign person unless they ordinarily reside in Australia.

There are some exceptions to this rule, for instances, for some purposes, people who are Australian citizens but do not ordinarily reside in Australia, and New Zealand citizens who hold a subclass 444 visa, may not be considered to be foreign persons.

EXCLUDING FOREIGN PERSONS FROM YOUR TDT

There are some simple steps you can take to avoid the foreign investment restrictions from applying to your TDT.

Option 1 – Exclude Foreign Persons as beneficiaries of your TDT

The simplest option is to exclude foreign persons from benefiting from your TDT.

This exclusion will be forever and is generally suitable in situations where you are confident that you will never want any foreign person to receive money from the TDT.

Don’t forget that TDTs can last for up to 80 years from the date of your death and it can be hard to look so far ahead into the future.

ADVANTAGES

- Simpler than Option 2
- Less compliance costs than Option 2
- Avoids unnecessary taxes, duties, surcharges and approval from the Foreign Investment Review Board

DISADVANTAGES

- No flexibility to adapt to future changes in your beneficiaries' circumstances
- Foreign persons are excluded from benefitting from your entire estate
- Less flexibility than Option 2

Option 2 – Set up an extra TDT that excludes foreign persons as beneficiaries

A more flexible option is to include an extra TDT in your Will which your executor can choose to utilise (if required) after you die.

This extra TDT (referred to as a **foreign person excluded TDT** or **FPE TDT**) is optional and excludes foreign persons from benefiting from its assets.

If at the date of your death you own any residential property, your executor can choose to distribute the residential property into the FPE TDT so that it is not exposed to the foreign investment restrictions.

The other assets that you own at the date of your death can pass to the normal TDT in your will which would include both Australian persons and foreign persons as beneficiaries.

ADVANTAGES

- Increased flexibility to adapt to future changes in your beneficiaries' circumstances
- The FPE TDT is optional
- Foreign persons can be excluded from benefitting from only residential property, avoiding unnecessary taxes, duties, surcharges and approval from the Foreign Investment Review Board
- Foreign persons can potentially still benefit from the other assets in your estate
- Increased asset protection as riskier assets (like residential property) are segregated from low risk assets (like shares & cash)

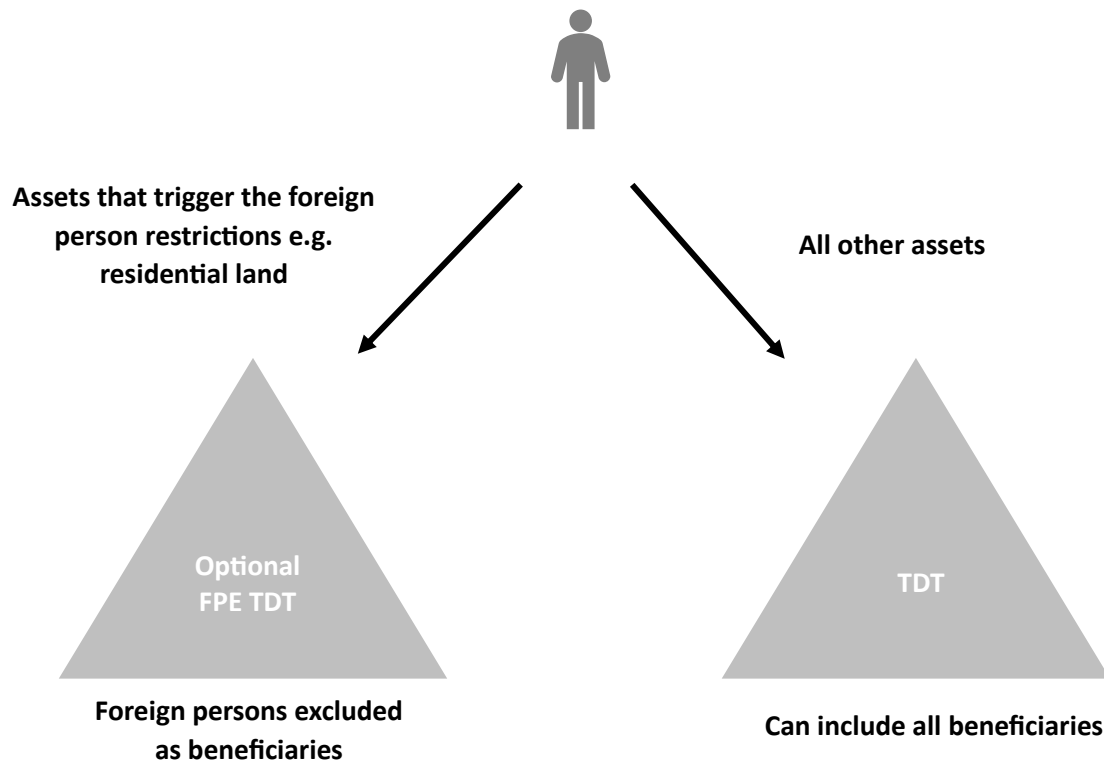
DISADVANTAGES

- There will be increased compliance costs, as each trust will require a tax return, financial statements and bank account
- Foreign persons are still excluded from benefitting from any residential property assets
- More complex than Option 1

This approach gives you more flexibility to adapt to future changes in your beneficiaries' circumstances, as you do not have to exclude foreign persons from benefitting from your entire estate.

However, it does add additional complexity and compliance, as you will potentially be creating more trusts than under Option 1.

Here's a diagram demonstrating how the assets may be allocated between the TDT and the FPE TDT:



WHAT DOES THIS MEAN FOR MY ESTATE PLAN?

Frustratingly, it is irrelevant whether any actual foreign persons will benefit from your TDT.

We must take a proactive approach to positively exclude foreign persons from benefiting from any TDT which will inherit any residential land from you.

EXCLUDE FOREIGN PERSONS FROM YOUR TDT IF:

- ☐ You are establishing one or more TDTs in your will
- ☐ There is a chance that residential property will be gifted into a TDT under your will
- ☐ You want to avoid the imposition of expensive fees and surcharges associated with the foreign persons regimes on your estate