

South Australia

Stamp Duties (Foreign Ownership Surcharge) Amendment Act 2017

An Act to amend the *Stamp Duties Act 1923*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Amendment provisions

Part 2—Amendment of *Stamp Duties Act 1923*

- 3 Amendment of section 2—Interpretation
- 4 Insertion of Part 3 Division 9
 - Division 9—Foreign ownership surcharge
 - 72 Surcharge for foreign purchasers of residential land
- 5 Insertion of section 102AB
 - 102AB Surcharge where foreign person or group acquires interest in residential land

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Stamp Duties (Foreign Ownership Surcharge) Amendment Act 2017*.

2—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Stamp Duties Act 1923*

3—Amendment of section 2—Interpretation

- (1) Section 2(1)—after the definition of *financial product* insert:

foreign person—see subsection (14);

foreign trust—see subsection (14);

(2) Section 2(1)—after the definition of *unit trust scheme* insert:

wholly foreign owned corporation—see subsection (14);

wholly foreign owned trust—see subsection (14);

(3) Section 2—after subsection (13) insert:

(14) In this Act—

(a) a person is a *foreign person* if—

(i) in the case of a natural person—the person is not—

(A) an Australian citizen within the meaning of the *Australian Citizenship Act 2007* of the Commonwealth; or

(B) the holder of a permanent visa within the meaning of section 30(1) of the *Migration Act 1958* of the Commonwealth; or

(C) a New Zealand citizen who is the holder of a special category visa within the meaning of section 32(1) of the *Migration Act 1958* of the Commonwealth; or

(ii) in the case of a corporation—

(A) the corporation is incorporated in a jurisdiction that is not an Australian jurisdiction; or

(B) a person who is a foreign person (by virtue of this paragraph) or a trustee for a foreign trust, or a number of such persons in combination—

- holds or hold 50% or more of the corporation's shares; or
- is or are entitled to cast, or control the casting of, 50% or more of the maximum number of votes at a general meeting of the corporation; and

(b) a trust is a *foreign trust* if—

(i) in the case of a trust where the beneficial interests are fixed—a beneficial interest of 50% or more of the capital of the trust property is held by 1 or more foreign persons; or

(ii) in the case of a discretionary trust—1 or more of the following is a foreign person:

(A) a trustee;

(B) a person who has the power to appoint under the trust;

- (C) an identified object under the trust;
 - (D) a person who takes capital of the trust property in default; and
- (c) a corporation is a *wholly foreign owned corporation* if a foreign person or the trustee for a foreign trust, or a number of such persons in combination—
- (i) holds or hold 100% of the corporation's shares; or
 - (ii) is or are entitled to cast, or control the casting of, 100% of the maximum number of votes at a general meeting of the corporation; and
- (d) a trust is a *wholly foreign owned trust* if it is not a discretionary trust and a beneficial interest of 100% of the capital of the trust property is held by 1 or more foreign persons.
- (15) In subsection (14)—
- hold*—a person holds property (including a security of a corporation) if the person—
- (a) is registered as the holder; or
 - (b) is beneficially entitled to the property; or
 - (c) controls the exercise of rights attached to the property.

4—Insertion of Part 3 Division 9

Part 3—after Division 8 insert:

Division 9—Foreign ownership surcharge

72—Surcharge for foreign purchasers of residential land

- (1) This section applies to a dutiable instrument (including a statement under section 71E) executed, or taken to have been executed, on or after 1 January 2018.
- (2) If an instrument to which this section applies effects, acknowledges, evidences or records a transaction whereby an interest in residential land is acquired by a foreign person or a person who takes the interest as trustee for a foreign trust, the person is liable to pay a surcharge (a *foreign ownership surcharge*) to the Commissioner in addition to the duty payable on the instrument.
- (3) The amount of the foreign ownership surcharge is 7% of the value of the interest acquired by the person in the residential land by virtue of the transaction effected, acknowledged, evidenced or recorded by the dutiable instrument.
- (4) The foreign ownership surcharge is to be taken for the purposes of this Act to be duty payable on the instrument.

- (5) If—
- (a) a foreign ownership surcharge was paid by a person under this section because the person was a foreign person when an interest in residential land was acquired by the person; and
 - (b) the person ceases to be a foreign person not more than 12 months after the acquisition of the interest; and
 - (c) the person retains the interest at the time that the person ceases to be a foreign person,
- the Commissioner must, on application by the person, refund the amount of the foreign ownership surcharge to the person.
- (6) If—
- (a) a foreign ownership surcharge was paid by a person under this section because the person was a trustee for a foreign trust when an interest in residential land was acquired by the person (taking as trustee for the trust); and
 - (b) the trust for which the person is trustee ceases to be a foreign trust not more than 12 months after the acquisition of the interest; and
 - (c) the person retains the interest on behalf of the trust at the time that the trust ceases to be a foreign trust,
- the Commissioner must, on application by the person, refund the amount of the foreign ownership surcharge to the person.
- (7) If, not more than 3 years after the acquisition of an interest in residential land effected, acknowledged, evidenced or recorded by an instrument to which this section applies, the person who acquired the interest becomes a foreign person, or, where the interest was acquired by the person taking as trustee, the trust for which the person is trustee becomes a foreign trust, the following provisions apply:
- (a) subject to paragraph (b)—
 - (i) the person must, within 28 days of becoming a foreign person or the trust becoming a foreign trust, notify the Commissioner in writing of that fact; and
 - (ii) a foreign ownership surcharge is payable on the instrument; and
 - (iii) for the purposes of section 20, the surcharge is to be regarded as having become payable when the person became a foreign person or the trust becomes a foreign trust; and

- (iv) the person may, at the discretion of the Commissioner, be liable to pay interest and penalty tax as if the failure to pay the surcharge at the date of the acquisition were a tax default under the *Taxation Administration Act 1996*;
 - (b) paragraph (a) does not apply if—
 - (i) the interest in the residential land was conveyed or transferred by the person or trust before the person or trust became a foreign person or a foreign trust; or
 - (ii) a foreign ownership surcharge has been paid, or is liable to be paid, in respect of the transaction by virtue of which the person or trust became a foreign person or a foreign trust;
 - (c) however, if the person or trust referred to in paragraph (b)(ii) is a corporation or trust that is not a wholly foreign owned corporation or trust—
 - (i) the person is liable to pay a foreign ownership surcharge on the instrument; but
 - (ii) the amount of the foreign ownership surcharge is to be reduced by the amount of the foreign ownership surcharge (if any) paid in respect of the transaction by virtue of which the person or trust became a foreign person or a foreign trust.
- (8) Land will be taken to be residential land for the purposes of this section if—
- (a) the Commissioner, after taking into account information provided by the Valuer-General, determines that it is being predominantly used for residential purposes; or
 - (b) the Commissioner, after taking into account information provided by the Valuer-General, determines that although the land is not being used for any particular purpose at the relevant time the land should be taken to be used for residential purposes due to improvements that are residential in character having been made to the land; or

- (c) the Commissioner, after taking into account information provided by the Valuer-General, determines that the land is vacant, or vacant with only minor improvements, that the land is within a zone established under the planning and development law of this State that envisages the use, or potential use, of the land as residential, and that the land should be taken to be used for residential purposes due to that zoning (subject to the qualification that if the zoning of the land indicates that the land could, in a manner consistent with the planning and development law, be used for some other purpose (other than for primary production) then the vacant land will not be taken to be used for residential purposes).
- (9) For the purposes of subsection (8), the date that is relevant to a determination as to whether land is residential land is the date of the relevant instrument.
- (10) In this section—
residential land—see subsection (8).

5—Insertion of section 102AB

After section 102A insert:

102AB—Surcharge where foreign person or group acquires interest in residential land

- (1) This section applies to a transaction that is dutiable under this Part if the transaction was entered into on or after 1 January 2018.
- (2) If a foreign entity notionally acquires an interest in residential land as a result of a transaction to which this section applies, the entity is liable to pay a surcharge (a *foreign ownership surcharge*) to the Commissioner in addition to the duty payable on the transaction under this Part.
- (3) If a foreign entity is a member of a group that notionally acquires an interest in residential land as a result of a transaction to which this section applies, the entity is liable to pay a surcharge (a *foreign ownership surcharge*) to the Commissioner in addition to the duty payable on the transaction by the group.
- (4) The amount of the foreign ownership surcharge under subsection (2) is 7% of the value of the interest notionally acquired by the foreign entity in the residential land (as determined under section 99).
- (5) The amount of the foreign ownership surcharge under subsection (3) is 7% of the value of the foreign entity's interest in the interest notionally acquired by the group in the residential land (as determined under section 99).
- (6) The foreign ownership surcharge is to be taken for the purposes of this Act to be duty payable on the transaction.

- (7) If—
- (a) not more than 12 months after a notional acquisition of an interest in residential land as a result of a transaction to which this section applies, an entity that has paid a foreign ownership surcharge under this section on the transaction ceases to be a foreign entity; and
 - (b) at the time the entity ceases to be a foreign entity—
 - (i) the entity retains the interest notionally acquired; or
 - (ii) in the case of an entity that paid the surcharge by virtue of being a member of a group that notionally acquired the interest—the group retains the interest notionally acquired, and the entity retains its interest in the interest notionally acquired by the group,

the Commissioner must, on application by the entity, refund the amount of the foreign ownership surcharge to the entity.

- (8) If, not more than 3 years after the notional acquisition of an interest in residential land as a result of a transaction to which this section applies, the entity that notionally acquired the interest becomes a foreign entity, or, if the interest was notionally acquired by a group, an entity that is a member of the group (and was a member of the group at the time of the acquisition) becomes a foreign entity, the following provisions apply:
- (a) subject to paragraph (b)—
 - (i) the entity must, within 28 days of becoming a foreign entity, notify the Commissioner in writing of that fact; and
 - (ii) a foreign ownership surcharge is payable on the transaction; and
 - (iii) for the purposes of section 102B, the surcharge is to be regarded as having become payable when the entity became a foreign entity; and
 - (iv) the entity may, at the discretion of the Commissioner, be liable to pay interest and penalty tax as if the failure to pay the surcharge at the date of the transaction were a tax default under the *Taxation Administration Act 1996*;
 - (b) paragraph (a) does not apply if—
 - (i) the entity ceased to have a notional interest in the residential land before the entity became a foreign entity; or

- (ii) in the case of an entity that is (but for this subparagraph) liable to pay the surcharge by virtue of being a member of a group that notionally acquired the interest—the group ceased to have a notional interest in the residential land, or the entity ceased to have an interest in the interest notionally acquired by the group, before the entity became a foreign entity; or
 - (iii) a foreign ownership surcharge has been paid, or is liable to be paid, in respect of the transaction by virtue of which the entity became a foreign entity;
 - (c) however, if an entity referred to in paragraph (b)(iii) is a corporation or trust that is not a wholly foreign owned corporation or trust, then—
 - (i) the entity is liable to pay a foreign ownership surcharge on the transaction; but
 - (ii) the amount of the foreign ownership surcharge is to be reduced by the amount of the foreign ownership surcharge (if any) paid in respect of the transaction by virtue of which the entity became a foreign entity.
- (9) Land will be taken to be residential land for the purposes of this section if—
 - (a) the Commissioner, after taking into account information provided by the Valuer-General, determines that it is being predominantly used for residential purposes; or
 - (b) the Commissioner, after taking into account information provided by the Valuer-General, determines that although the land is not being used for any particular purpose at the relevant time the land should be taken to be used for residential purposes due to improvements that are residential in character having been made to the land; or
 - (c) the Commissioner, after taking into account information provided by the Valuer-General, determines that the land is vacant, or vacant with only minor improvements, that the land is within a zone established under the planning and development law of this State that envisages the use, or potential use, of the land as residential, and that the land should be taken to be used for residential purposes due to that zoning (subject to the qualification that if the zoning of the land indicates that the land could, in a manner consistent with the planning and development law, be used for some other purpose (other than for primary production) then the vacant land will not be taken to be used for residential purposes).

- (10) For the purposes of subsection (9), the date that is relevant to a determination as to whether land is used for residential purposes is the date of the relevant transaction.
- (11) In this section—
foreign entity means a foreign person or a foreign trust;
residential land—see subsection (9).