

# Worrall Moss Martin News

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## Foreign Investor Duty Surcharge and Family Trusts: What You Should Know

From 1 January 2020, the Foreign Investor Duty Surcharge ("FIDS") will increase significantly. The surcharge duty on residential property will increase to 7%, and on primary production to 1.5%. When added to the standard duty imposed on real property purchases (which is imposed on a sliding scale, but on average falls between 3.5% and 4.5% of the value of the property), FIDS can have a substantial impact on the duty payable on a real property transaction.

### What is FIDS?

FIDS is an additional amount of duty charged when real property is acquired (either directly or indirectly) by a "foreign person". A foreign person includes a foreign individual, foreign corporation, or, importantly, a foreign trust.

### Can the FIDS Impact your Trust?

A trust in which the trustees have either an obligation or a discretion to distribute trust income or capital to any person, or class of persons, is potentially a "foreign trust" if any of those beneficiaries are, or become, "foreign persons".

In determining whether a discretionary trust is a "foreign trust", the State Revenue Office has advised that "[a]ll trusts are deemed to be foreign unless proved otherwise". This places the onus on the controllers of the trust to "prove" that their trust is not a foreign trust,



and if that proof cannot be provided, the FIDS will be payable on all property acquisitions by the trust.

It is not enough to merely prove, at the time of the transfer, that the beneficiaries, trustees, and controllers of the trust are not "foreign persons". Without taking proper measures to review the trust prior to the acquisition of property, it is highly likely that a trust acquiring property will be liable for the payment of the FIDS.

### Can the FIDS be Avoided?

To prove that the trust is not a foreign trust, it is necessary to establish to the satisfaction of the State Revenue Office that the trust, now and in the future, prohibits distributions to any foreign persons. Whilst this may seem like a simple task, in reality it is a complex undertaking, requiring a detailed review of, and likely amendments to, the trust deed for the trust. It is important that the correct and proper arrangements are put in place before the trust acquires property, and ideally before the trustees enter into any agreement to acquire property.

Worrall Moss Martin Lawyers has specialist skills and experience in reviewing and amending trust deeds to successfully avoid liability for the FIDS when acquiring property within a trust structure. Please contact Kimberley Martin or David Bailey if you wish to discuss the options for reviewing your trust structures to avoid the imposition of the FIDS when transacting in real property.

## Is It Possible to Remove, and Use, a Person's Sperm After Death? *Re Cresswell* [2018] QSC 142



*Re Cresswell*, decided by the Supreme Court of Queensland on 20 June 2018, is an interesting decision about the ability of a deceased person's partner to obtain a court order to 'harvest' their partner's sperm, in order to try to conceive a child.

**Facts:** Mr Davies died by suicide on 23 August 2016. At the time of his death, Mr Davies had never made a valid Will, nor had he discussed his testamentary intentions with anyone or left any written notes about the distribution of his estate. When he died, Mr Davies had been in a relationship with Ms Cresswell for around three years. They were living together, had been saving to purchase a house, and had discussed getting married and having children together. After his death, Ms Cresswell sought to obtain Mr Davies' sperm, so that she could use it to try to conceive his child.



On 24 August 2016, Ms Cresswell obtained an emergency Court order for the removal of Mr Davies' sperm and testes for storage. The Court held that the sperm and testes were to be stored, until Ms Cresswell successfully applied for an order that she was entitled to take possession of the sperm for its use in IVF treatment.

**Decision:** The Court hearing to decide whether Ms Cresswell could be legally entitled to Mr Davies' sperm was held 15 September 2017. Mr Davies' parents fully supported Ms Cresswell's application, however, as this was at the time a unique case (after recent changes to the *Transplant and Anatomy Act 1979* (Queensland)), the Queensland Attorney-General opposed the application so that the matter could go before the Court for a judgement on the interpretation of the current law.

Brown J held that the removal of the sperm fell within the meaning of "medical purpose" in s 22 of the *Transplant and Anatomy Act 1979* (Queensland), and accordingly, once it had been removed, the sperm was property that was capable of possession. The Court, in deciding whether to grant that

possession to Ms Cresswell, considered a number of discretionary factors, including what would be in the best interests of the (potential) child, whether Ms Cresswell's decision was a rational one, the support of Mr Davies' parents, and the prevailing community standards.

The Court made the orders that Ms Cresswell sought, and she was permitted to use Mr Davies' sperm for IVF treatment.

**Relevance in Tasmania:** It is important to note that s 22(1)(b) of the *Transplant and Anatomy Act 1979* (Queensland) requires that a deceased "*had not, during his or her lifetime, expressed an objection to the removal after death of tissue from his or her body*". The corresponding Tasmanian provision (s 23 of the *Human Tissue Act 1985* (Tasmania)), reverses that onus, providing that the deceased "*had, during his lifetime, expressed the wish for, or consented to, the removal after his death of tissue from his body*". It is likely that, in order to achieve a similar result in practice in Tasmania, an application must establish that the deceased specifically and expressly consented to the removal for "*the purposes of the use of the tissue for therapeutic, medical or scientific purposes*".

This is an interesting emerging area of law, and Worrall Moss Martin Lawyers urges our clients to consider whether, as part of a comprehensive estate planning strategy, consent for tissue removal in the event of an unexpected death may be a matter for contemplation in their circumstances. Please contact Kate Moss or Robert Meredith if you wish to discuss consent for removal of tissue in the event of an unexpected death.

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## Further Information

### Our Website:

A wealth of information in relation to estate and commercial matters can be found at our website [www.pwl.com.au](http://www.pwl.com.au)

### Contributions:

Contributions and suggestions from Worrall Moss Martin News readers are always appreciated. Email us at [info@pwl.com.au](mailto:info@pwl.com.au)

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