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## 1 July 2017 amended CGT withholding payments for real property sales

### Key points

- ✓ Amended withholding requirements for contracts of sale of real estate worth \$750,000 or more from 1 July 2017.
- ✓ All purchasers of such real estate must register to withhold 12.5 per cent for acquisitions from 1 July 2017 (previously 10 per cent) unless they are given a clearance certificate by the vendor.
- ✓ Vendors of such property who are not foreign residents need to apply for a clearance certificate as soon as possible.
- ✓ Real estate includes vacant land, residential and commercial property - no exceptions.

### Introduction

Withholding requirements for purchasers of certain property in Australia commenced 1 July 2016 and were amended in June 2017 by the *Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Act 2017* (Cwlth). The first version of this Federal Government withholding tax was brought in by the *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2015*. Both Acts amended schedule 2 of the *Taxation Administration Act 1953* (Cwlth) (the schedule) and impacts on lawyers in many practice areas including conveyancing, family, business and wills and estates.

While the aim of the legislation is to capture unpaid tax from foreign residents, any vendor selling taxable Australian real property worth \$750,000 or more for acquisitions from 1 July 2017 (previously \$2M or more) will be subject to the withholding tax unless they apply for and provide to the purchaser a clearance certificate by the time of settlement.

The legislation also applies to some indirect interests in Australian property including leases, mining and quarrying rights, and options to acquire interests in such property. You can find two other relevant LPLC bulletins [here](#).

## Background

The reasoning behind the legislation is to capture the tax payable on capital gains by foreign residents that has historically been difficult to recover after the funds from a sale of property go off shore.

The recent amendments have decreased the threshold to \$750,000 and increased the withholding amount to 12.5 per cent.

## Key obligations

A purchaser of a relevant **CGT asset** will be required to register to withhold 12.5 per cent for acquisitions from 1 July 2017 (previously 10 per cent) or another amount specified, from the purchase price of the asset and remit that money to the Australian Taxation Office (ATO). Failure to do so will render the purchaser liable to penalties and interest.

## Exceptions

- The **CGT asset** is taxable Australian real property with a market value of less than \$750,000 for acquisitions from 1 July 2017 (previously \$2M) (subparagraph 14-215(1)(a) of the schedule).
- The **CGT asset** is an indirect Australian real property interest, the holding of which causes a company title interest to arise with a **market value** of less than \$750,000 for acquisitions from 1 July 2017 (previously \$2M) (subparagraph 14-215(1)(a) of the schedule).
- The **CGT asset** is either taxable Australian real property or an indirect Australian real property interest, the holding of which causes a company title interest to arise, with a market value of \$750,000 or more for acquisitions from 1 July 2017 (previously \$2M or more) but the vendor provides the purchaser a clearance certificate stating that no withholding tax is required (subparagraph 14-210(2) of the schedule).
- The entity provides a declaration that the **CGT asset** is a membership interest but not an indirect Australian real property interest and the purchaser is unaware the declaration is false (subparagraphs 14-210(3) and 14-225(2) of the schedule). Provide the name of any planning overlay affecting the land. See section 32C(d)(iv).

More exceptions can be found in subparagraph 14-215(1) of the schedule.

## Assets which are caught

A **CGT asset** for the purpose of withholding is defined in subparagraph 14-200(1)(c) of the schedule as the following.

- Taxable Australian real property. The ATO examples include:
  - land, buildings, both residential and commercial property
  - leases over real property
  - mining, quarrying, prospecting rights.
- An indirect Australian real property interest. This means any interest in an Australian entity whose majority assets consist of taxable Australian real property.
- An option or right to acquire taxable and/or indirect Australian real property.

## Market value

The ATO has said that in most cases the market value of an asset will be the purchase price negotiated between a purchaser and vendor, acting at arm's length as part of a competitive bargaining process.

## What to do when acting for a vendor

If the asset is likely to be sold in the vicinity of \$750,000 or more from 1 July 2017 (previously \$2M or more) undertake the following actions.

1. Explain to the vendor that if the asset is sold for \$750,000 or more from 1 July 2017 (previously \$2M or more) the purchaser is obliged to withhold 12.5 per cent of the purchase price at settlement and pay it to the ATO unless a clearance certificate is obtained. Confirm the explanation in writing.
2. An application for a clearance certificate should be made as soon as possible. Leaving it too late may create unnecessary complications in the lead up to and at settlement.
3. If you are making the application have the client confirm the required information in writing.
4. Check that the clearance certificate is in the name of the vendor as set out on the title.
5. Attach a copy of the clearance certificate to the contract of sale.
6. Insert an appropriate special condition in the contract dealing with the sale by a foreign resident. The Law Institute of Victoria has issued a new special condition 1B to be included in contracts of sale of real estate. You can find the special condition [here](#).
7. If withholding tax is payable:
  - a. consider as soon as possible if there is sufficient funds to discharge any mortgages or other encumbrances if 12.5 per cent of the purchase price is withheld
  - b. where there will not be sufficient funds advise the client:
    - i. the mortgagee may refuse to discharge the mortgage, and the settlement will be jeopardised and
    - ii. the client or the mortgagee can apply for a variation of the amount that must be withheld. The ATO has indicated it will take 28 days to finalise a variation
  - c. make a copy for the file of any cheque payable to the ATO produced at settlement.
8. Where the purchaser withholds money at settlement inform the client that they should seek confirmation from the ATO that payment has been made by the purchaser and to inform you if they discover it has not been remitted.

## What to do when acting for a purchaser

If the purchase price is \$750,000 or more from 1 July 2017 (previously \$2M or more) undertake the following actions.

1. Check the contract documents for a clearance certificate.
2. If you do receive a clearance certificate read it carefully and check:
  - a. the name on the certificate matches the name of the vendor
  - b. the clearance certificate is provided during the 12 month period from the date of issue,

and that this is before settlement occurs, and it does not matter how long into the future the settlement may be

- c. the authenticity of the certificate by using the verification procedure which the ATO is making available.
3. If you have not received a clearance certificate in the lead up to settlement:
    - a. register the purchaser as a withholder
    - b. include the amount payable to the ATO for 12.5 per cent for acquisition from 1 July 2017 (previously 10 per cent) in the list of payments to be drawn from the settlement funds. Details of this payment should be included on the statement of adjustments sent to the vendor's practitioner.
  4. The ATO is expecting an electronic payment but may allow alternative forms of payment. Where the ATO allows payment by cheque, take any cheque for the ATO to settlement so the vendor can take a copy.
  5. Promptly make electronic payment or send the cheque to the ATO after settlement.
  6. The legislation provides that the purchaser must pay the required amount to the ATO on or before the day the purchaser becomes the owner of the property. See subparagraph 14-200(2). In a Learner Guide published by the ATO the statement is made that:

*'.....the Commissioner will administratively allow a short period after settlement to receive payment before imposing general interest charges and initiating recovery action.'*

## ATO forms and information

Further information can be found at the ATO's website [here](#).

The following ATO online forms are available at [www.ato.gov.au/FRCGW](http://www.ato.gov.au/FRCGW).

1. Clearance certificate application for Australian residents.
2. Variation application for foreign residents.
3. Purchaser payment notification. This form is used to register the purchaser as a withholder.