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Amended CGT withholding payments for options, company title interests and indirect Australian real property transactions

This bulletin contains information on the withholding requirements which commenced on 1 July 2016 as amended in June 2017 by the *Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Act 2017* (Cwlth).

This bulletin focuses on:

- options and rights to acquire
- company title interests
- indirect Australian real property interests.

You can find two other relevant LPLC bulletins [here](#).

Options and rights to acquire

All grants of options and rights to acquire Australian real property or indirect Australian real property interests are subject to withholding regardless of the value of the option or right where the grantor is a foreign resident.

Company title interests

A company title involves the ownership of shares in a company which owns real property. The shares confer the right to occupy a specified area of the real property, usually an apartment used as a dwelling.

Transactions involving the transfer of shares in a company title are treated the same as any other acquisition of an interest in Australian real property. For example, they are excluded where the market value is less than \$750,000 from 1 July 2017 (previously \$2M).

Indirect Australian real property interest

Interests such as shares and units in an entity, known as membership interests, are indirect Australian real property interests where the following two tests are satisfied.

- A foreign resident (together with associates) holds a 10 per cent or more interest in the relevant entity (non-portfolio interest test) for 12 months in the 24 months prior to the dealing.
- The majority of the entity's assets consist of Australian real property, or interests in Australian real property (principal asset test).

Certain transactions which would otherwise be caught are excluded, for example transactions on an approved stock exchange.

Non-portfolio interest test

An interest held in another entity is a non-portfolio interest if the sum of the membership interests held in that other entity is 10 per cent or more either at the time of the transaction, or through a 12-month period in the last 24 months leading up to the transaction.

The amount of the interest being sold by the foreign resident is irrelevant. What is important is that the interest held is or has been 10 per cent or more. Importantly, the test is assessed on an associate inclusive basis.

Example

At the time a foreign resident disposed of its interest in a company it held a 15 per cent interest in the company.

The foreign resident sold eight per cent of its 15 per cent interest.

So long as the foreign resident initially owned 10 per cent or more then the disposal of eight per cent is caught by the withholding requirements.

Principal asset test

The principal asset test is used to determine whether an entity's underlying value is principally derived from Australian real property.

A membership interest in an entity passes the principal asset test if the sum of the market values of the entity's assets that are taxable Australian real property exceeds the sum of the market values of the assets that are not.

Example

The assets of the mining company are:

- mining rights \$1.7M
- plant and equipment \$4.1M
- mining information \$2.8M
- land \$5.0M.

The mining information and plant and equipment do not come within the scope of taxable Australian real property.

This means the market values of the taxable Australian real property of the mining company is \$6.7M and of the other assets \$6.9M.

As the sum of the market values of the non-taxable Australian real property assets exceeds that of the taxable Australian real property, the principal asset test is not satisfied.

Consequently, the eight per cent interest that the foreign resident has disposed of is not an indirect Australian real property interest, so no foreign resident capital gains withholding would apply to the disposal by the foreign resident.

Residency declarations

A vendor can make a declaration that it is an Australian resident in relation to:

- indirect Australian real property interests (other than company title interests) and
- options and rights to acquire taxable Australian real property or indirect Australian real property interests.

A purchaser may rely on the declaration unless the purchaser has specific knowledge that the declaration is false, provided the vendor gives the declaration before the buyer acquires the asset in question.

Membership interest declarations

A vendor can make a declaration that a membership interest is not an indirect Australian real property interest.

A purchaser may rely on the declaration unless the purchaser has specific knowledge that the declaration is false, provided the vendor gives the declaration before the buyer acquires the asset in question.