

Changes to Foreign Resident Capital Gains Withholding Scheme

In its 2017-2018 Federal Budget, the Government announced changes to both the Foreign Resident Capital Gains Withholding (FRCGW) rate and threshold. These changes were in response to the mounting housing affordability issue in Australia and ensure greater tax compliance of foreign investors.

THE CHANGES

The new legislation makes significant changes to the foreign residential capital gain withholding framework introduced in July 2016; specifically:

- Increasing the withholding rate from 10 per cent to 12.5 per cent; and
- Reducing the withholding threshold to from \$2 million to \$750,000.

The changes apply to contracts entered into on or after 1 July 2017; those which were already in place but are not settled until after 1 July are subject to the existing rate (\$2 Million).

HOW DO THE CHANGES WORK?

When a **foreign vendor** sells a taxable Australian property, the **purchaser** is required to withhold 12.5 percent of the purchase price (N.B the legislation refers to this amount as the “first element of the cost base of the asset”) and pay this amount to the Australian Tax Office (ATO). The obligation will only arise if the purchase price of the property is greater than \$750,000 (the new withholding threshold).

WHAT ASSETS ARE AFFECTED?

Real Property

- Taxable Australian real property with a market value above the new threshold (\$750,000);
- Leases;
- Vacant residential/ commercial properties, land;
- Mining, quarrying or prospecting rights when the resources are located in Australia.

Other Assets

- Indirect Australian real property interests in Australian entities whose majority assets consist of the above asset types.
- Options or rights to acquire the above assets.

WHO IS THE VENDOR?

The vendor is the entity that holds the legal title the asset withholding applies to (they can also be the legal owner of the asset such as a trustee)



HOW DOES THIS AFFECT AUSTRALIAN RESIDENTS?

Prior to settlement of the sale of one of the aforementioned assets' Australian resident vendors must provide the purchaser with one of the following documents to avoid the withholding:

- A clearance certificate (available through the ATO) if the disposal or sale is of a real Australian Property;
- A vendor declaration they are not a foreign resident for all other asset types.

Clearance certificates aim to provide clarity and certainty to purchases regarding their withholding



obligations and once issued (up to 14 days turnaround) are valid for 12 months.

Vendor Declarations for real Australian assets will take the form of either a residency declaration or a declaration stating the asset is not an indirect Australian real property interest and specify that withholding isn't required on the acquisition of the asset.

HOW DOES THIS AFFECT FOREIGN RESIDENTS?

Foreign resident vendors must declare their assessable income (including capital gains) and lodge a tax return declaring their assemble income.

When lodging their tax return, foreign vendors may claim a credit for any withholding amount paid to the ATO in their tax return.

Foreign resident vendors may also apply for a variation of the withholding rate through the ATO.

More Information can be found at:

<https://www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding--Impacts-on-foreign-and-Australian-residents/>

If you are unsure about your obligations under the new legislation please contact Adam Robinson, Georgina Vlahos or Guy Lawton.

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