

Alert

PROPERTY

Are you Entering into a Contract for the Sale of Land on or After 1 July?

Foreign Resident Capital Gains Withholding Payments Regime

By Briony Hutchens & Julia Mignone

From today amendments to the *Taxation Administration Act 1953* (Cth) ("Act") that impose a stringent new regime requiring purchasers of certain Australian assets to withhold 10% of the purchase price and pay it to the Commissioner of Taxation come into effect.

While the intention of the legislation is to ensure that any foreign resident vendors comply with their obligation to pay Australian tax on the realisation of Australian assets, the practical effect is that all Australian resident vendors will need to comply with the prescribed regime prior to settlement in order to receive the full proceeds at the time of settlement.

The starting position for parties is to determine whether the transaction relates to an asset to which this regime applies.

1) What is a relevant asset?

The rules apply to transactions relating to:

- a direct interest in Australian real property;
- an indirect interest in Australian real property, which includes the sale of shares in a company which holds Australian real property where the market value of the Australian real

property assets of the company is more than the market value of its other assets; and

- the grant of an option or right to acquire a direct or indirect interest in Australian real property.

For the purpose of the legislation, Australian real property includes mining, quarrying or prospecting rights and leases over Australian real property.

This article only addresses the application of the amendments to the sale of a direct interest in Australian real property.

2) What is the value of the relevant asset?

Where the market value of the land is \$2 million dollars or more (exclusive of GST) then the parties are subject to the new regime. In a transaction involving unrelated parties, the purchase price will usually be accepted by the Commissioner as the market value of the asset, however this may not always be the case.

3) Is the CGT asset excluded by section 14-215?

Section 14-215 of the Act excludes some CGT assets including transactions on an approved stock exchange and assets sold from the administration of a bankrupt estate, personal insolvency

agreement or scheme under Division 6 of the *Bankruptcy Act 1966*.

If the transaction involves the sale and purchase of a direct interest in land with a value of \$2 million or more then the purchaser needs to ensure that the relevant contractual document permits the purchaser to retain 10% of the purchase price for the land under the contract if required by law to do so.

4) When does a purchaser of a land contract withhold?

A purchaser is obligated to withhold 10% of the purchase price if the vendor has not provided to the purchaser before settlement a clearance certificate issued by the Commissioner for a period covering the time that the transaction was entered into and certifying that the vendor was, at that time, not a foreign resident. For this purpose, foreign resident has the same meaning as under the *Income Tax Assessment Act 1936* (Cth).

While the intention of the legislation is place the onus for compliance on the purchaser, practically parties to transactions will find that the onus is on the vendor to obtain and provide to the purchaser a valid Clearance Certificate.

continued overleaf ...

What is the process for obtaining a Clearance Certificate?

The vendor must apply to the ATO for a Clearance Certificate. The portal for making an application for a Clearance Certificate is now live on the ATO website (see website portal link below) and an application can be made at any time before a transaction noting that the Certificate is only valid for 12 months and must be valid at the time that the transaction is entered into.

<https://www.ato.gov.au/general/capital-gains-tax/in-detail/calculating-a-capital-gain-or-loss/foreign-resident-capital-gains-withholding/>

Where a vendor is not entitled to a Clearance Certificate, either the vendor or the purchaser can apply to the ATO for a variation to the amount required to be withheld, for example if the vendor will not have a capital gains tax liability as a result of the sale because the land is being sold at a loss.

Who does a purchaser pay?

Where an amount is required to be withheld, a purchaser will be required to pay the amount to the ATO at or before settlement.

To do so, the purchaser must complete an online "Purchaser Payment Notification" form which requires disclosure of the details of the vendor, purchaser and the asset which is the subject of the transaction. The purchaser can then pay the relevant amount to the ATO by electronic funds transfer or cheque (at a post office or sent directly to the ATO).

There are penalties for purchasers failing to pay the amount on time.

What does this mean for you?

If you are a vendor entering into a contract for sale of Australian land on or after 1 July 2016 and the market value of the land \$2 million dollars or more, THEN you need to apply for a Clearance Certificate that covers the time at which you enter into the sale contract and provide a copy of the Clearance Certificate to the purchaser before settlement to prevent the purchaser from being obligated to retain 10% of the purchase price.

If you are a purchaser under a contract entered into on or after 1 July 2016 and the market value of the Australian real property you are purchasing is \$2 million dollars or more THEN if the vendor doesn't provide you with a copy of a Clearance Certificate covering the time that the contract was entered into you must retain 10% of the purchase price and remit it to the ATO.

If you are entering into an option for the sale or purchase of land, as opposed to a contract for sale and purchase, the rules apply differently and you should contact our office for further information.



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