



Foreign resident capital gains withholding

Find out about the foreign resident capital gains withholding (FRCGW), including who it applies to and when it applies.

Capital gains withholding – Impacts on foreign and Australian residents

Find out when the foreign resident capital gains withholding (FRCGW) of 12.5% applies if disposing certain properties.

Capital gains withholding – a guide for conveyancers

If you are a conveyancer, find out about foreign resident capital gains withholding and what it means for vendors.

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Capital gains withholding: Impacts on foreign and Australian residents

Find out when the foreign resident capital gains withholding (FRCGW) of 12.5% applies if disposing certain properties.

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What is the FRCGW?

Foreign resident capital gains withholding (FRCGW) applies to vendors disposing of certain taxable property under contracts entered into from 1 July 2016.

The FRCGW tax rate is 12.5%.

It applies to real property disposals where the contract price is \$750,000 or more.

For contracts that were entered into from 1 July 2016 and before 1 July 2017, even if they did not settle until after 1 July 2017, the FRCGW withholding tax rate is 10% and applies to real property disposals where the contract price is \$2 million and above.

Background

This existing withholding legislation assists the collection of foreign residents' Australian tax liabilities.

It imposes an obligation on purchasers to withhold 12.5% of the purchase price and pay it to us, where a vendor enters into a contract on or after 1 July 2017 and disposes of certain [asset types](#) (or receives a lease premium for the [grant of a lease](#) over Australian real property).

The foreign resident vendor must lodge a tax return at the end of the financial year, declaring their Australian assessable income, including any capital gain (profit) from the disposal of the asset.

A [tax file number](#) (TFN) is required to lodge a tax return; they will need to apply for a TFN if they don't have one. The vendor may claim a credit for any withholding amount paid to us in their tax return.

Australian resident vendors can avoid the requirement of the purchaser to withhold the 12.5% by providing one of the following to the purchaser prior to settlement:

- for Australian real property, a [clearance certificate](#) obtained from us
 - Australian resident vendors selling real property will need to obtain a clearance certificate from us prior to settlement, to ensure they don't incur the 12.5% non-final withholding (to avoid possible delays in settlement the vendor should complete and lodge the form with us as early as practical as it can take up to 28 days to process) – an application for a clearance certificate can be lodged prior to a contract for sale being entered into

- for other asset types, a [vendor declaration](#)
 - the vendor may provide the purchaser with a vendor's declaration to specify withholding isn't required on the acquisition of the asset.

Vendors who are an **Australian resident for tax purposes**, but who have not obtained a clearance certificate before settlement, are taken to be foreign residents for the purposes of FRCGW. They will need to lodge an income tax return and claim a credit for the amount withheld. A credit for the amount withheld for foreign resident capital gains is applicable to the year the contract was signed. Therefore, it may take some time before the vendor can lodge the income tax return to declare the capital gain, be assessed and then given any available credit for the amount withheld.

Foreign resident vendors may apply for a [variation](#) of the withholding rate or make a declaration that a membership interest is not an indirect Australian real property interest and therefore not subject to withholding.

Purchasers must pay the amount withheld at settlement to the Commissioner of Taxation.

When the rules apply




- An entity (the purchaser) becomes the owner of a **capital gains tax (CGT) asset** as a result of acquiring it from a vendor (or vendors) under one or more transactions.
- At least one of those vendors is a [relevant foreign resident](#) at the time at least one of the transactions is entered into.
- The CGT asset is a certain type of Australian property or an [option or right](#) to acquire such property.
- The purchaser acquires the CGT asset under a contract entered into on or after 1 July 2016.
- There are no [exceptions](#).

While the objective of the rules is to assist in the collection of foreign residents' CGT liabilities, the withholding tax will apply regardless of

whether the vendor's gain on the sale of the asset is subject to tax under the CGT regime or as ordinary income.

The withholding obligation applies to both Australian resident and foreign resident purchasers.

Online forms and instructions

- [Clearance certificate application for Australian residents](#) 
- Capital gains withholding clearance certificate application online form and instructions – for Australian residents
- [Variation application for foreign residents and other parties](#) 
- Foreign resident capital gains withholding rate variation application online form and instructions
- [Purchaser payment notification](#) 
- Foreign resident capital gains withholding purchaser payment notification online form and instructions

Asset types

The legislation applies to the following asset types:

- real property – taxable Australian real property with a [market value](#) of \$750,000 or more
 - vacant land, buildings, residential and commercial property
 - mining, quarrying or prospecting rights where the material is situated in Australia
 - a lease over real property in Australia if a lease premium has been paid for the grant of the lease
- other assets
 - indirect Australian real property interests in Australian entities (that is, a membership interest of 10% or more in an entity whose underlying value is principally derived from Australian real property) – this includes shares in a company that owns land or a building erected on that land, where the ownership of the shares gives a right to occupy that land or building (that is, a company title interest in real property)

- options or rights to acquire any of the above asset types.

Market value

In many cases, the market value of a property will be the purchase price. Where the purchase price has been negotiated between the vendor and the purchaser, acting at arm's length, we will accept the purchase price as a proxy for market value.

However, there could be circumstances where the market value is different to the stated purchase price (for example, where the vendor and purchaser are related parties and did not deal with each other at arm's length). In such cases, we will not accept the purchase price as a proxy for market value and the purchaser will need to seek a separate expert evaluation.

Note: If the purchase price is used as a proxy for market value, the market value is the purchase price before adjustment for any disbursements at settlement (for example, council rates, water and sewer charges and strata levies). Therefore, the \$750,000 threshold test is applied to the purchase price before adjustment for disbursements.

Excluded assets

Some assets are not subject to the withholding, including:

- taxable Australian real property with a market value of less than \$750,000
- an indirect Australian real property interest providing a company title interest with a market value of less than \$750,000
- transactions conducted through an approved stock exchange
- transactions conducted using a broker-operated crossing system, such as a 'dark pool', as described in the ASIC Market Integrity Rules (ASX Market) 2010
- transactions subject to another withholding obligation
- securities lending arrangements, as these don't trigger a CGT liability for the vendor and therefore no payment obligation is imposed

- transactions where the vendor is in external administration or transactions arising from the administration of a bankrupt estate, a composition or scheme of arrangement, a debt agreement, a personal insolvency agreement, or same or similar circumstances under a foreign law.

Exceptions

Foreign resident capital gains withholding doesn't apply when the vendor disposes of either:

- an Australian real property and provides the purchaser with a [clearance certificate](#) from us
- any other asset where the purchaser is given a [vendor declaration](#).

Vendor

The vendor is the entity that holds the legal title to the asset this withholding applies to.

Where the asset is held on behalf of another entity, the vendor is the legal owner of the asset, for example, the trustee or custodian who holds the legal title on behalf of beneficiaries.

When the vendor is treated as a foreign resident

A vendor is treated as a foreign resident if:

- the vendor doesn't provide the purchaser with either a valid
 - [clearance certificate](#) by settlement, if they are disposing of an asset that requires a clearance certificate to be provided to avoid the withholding being imposed
 - [vendor declaration](#) stating they are an Australian resident, or that the membership interest is not an indirect Australian real property interest, when asked to do so by the purchaser with respect to a transaction involving an asset for which a vendor declaration can be used to avoid the withholding being imposed
- the purchaser applies the 'knowledge condition'.

Knowledge condition

The knowledge condition is only relevant to purchases of 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.

The knowledge condition will be satisfied where the purchaser either:

- knows or has reasonable grounds to believe the vendor is a foreign resident
- does not reasonably believe the vendor is an Australian resident and either
 - has a record about the acquisition indicating the vendor has an address outside Australia
 - is authorised to provide a financial benefit (for example, make a payment) to a place outside Australia (whether to the vendor or to anybody else).

Evidence for the knowledge condition

A purchaser in applying the knowledge condition must rely upon that information that it is aware of or has access to in making the decision. In some circumstances this will only be the share registry of the target entity whose interests are being acquired by the purchaser.

It would be expected that the purchaser would rely upon the share registry no earlier than as at the date of the offer acceptance. Reliance from this date reduces the possibility that changes in the vendors circumstances would occur up to the date of the transaction so as to change the purchaser's belief about the vendor had they known of it before taking ownership of the interest in the target.

Purchasers who are not comfortable determining whether the knowledge condition is satisfied, may seek a vendor declaration confirming the vendor is not a relevant foreign resident.

Failure by the vendor to provide the declaration in these circumstances can be taken by the purchaser as confirmation that the vendor is a relevant foreign resident.

Clearance certificates

A clearance certificate provides certainty to purchasers regarding their withholding obligations. It confirms the withholding tax is not applicable to the transaction.

The purchaser must withhold 12.5% of the purchase price in transactions involving taxable Australian real property, or an indirect Australian real property interest that provides company title interests, with a market value of \$750,000 or more, unless the vendor shows the purchaser a clearance certificate from us.

We process applications in order of date of receipt. To avoid possible delays in your settlement, apply online for a clearance certificate at [least 28 days](#) before you require it.

It is the vendor's responsibility to obtain the clearance certificate and provide it to the purchaser at or before settlement. To avoid unanticipated delays, and to ensure the certificate is valid at the time it is given to the purchaser, vendors seeking a clearance certificate should apply through the online form as early as practical in the sale process.

An application for a clearance certificate can be lodged before entering into a contract for sale.

If an Australian resident vendor does not provide a valid clearance certificate at or before settlement, they are, for the purpose of FRCGW, taken to be a foreign resident. The purchaser must withhold 12.5% of the purchase price for transactions above \$750,000 if no other [exceptions](#) apply. The FRCGW amount has not been withheld in error where either the vendor:

- is entitled to a clearance certificate and did not obtain one
- obtained a clearance certificate but did not provide it to the purchaser at or before settlement.


Australian resident vendors who don't provide a clearance certificate to the purchaser at or before settlement will need to lodge an income tax return, for the applicable year the contract was signed, and claim a FRCGW credit for the withheld amount. It may take months before the vendor can lodge the income tax return to declare the capital gain and claim any available credit.

The amount withheld may be refunded in part or in full once the income tax return is processed. It will be refunded in full if there is no CGT payable on the sale of the property (for example, it was their main

residence or there was a capital loss from its sale), and there are no tax debts payable.

Any tax refund calculated on the vendor's notice of assessment will be used to offset other tax debts, including debts on hold or debts with other government agencies, before the refund is paid to the vendor.

How to apply

The Australian resident entity (or their representative) will need to complete an online [Clearance certificate application for Australian residents](#) .

Where there are multiple Australian resident vendors disposing of the asset, each vendor should apply for a separate clearance certificate in their name only.

Australian residents who are not required to lodge tax returns, such as aged pensioners, are still required to obtain a clearance certificate.

If you are a foreign resident there is no point in you lodging a clearance certificate application, your application will be declined as you are not entitled to receive one. However, if you may be entitled to a [variation](#) to the withholding rate, then you can lodge a variation request.

If you can't access the webpage phone us on:

- **13 28 66** (Fast Key Code **4 2**) within Australia
- **+61 2 6216 1111** outside Australia to obtain details of what you need to provide.

Where a valid clearance certificate is provided, the purchaser is not required to withhold an amount from the purchase price for the vendor listed in the clearance certificate.

If an Australian tax resident vendor has had withholding taken from their sale proceeds, for example because they didn't provide the purchaser with a clearance certificate, they will be able to claim a credit for that amount when they lodge their tax return. This credit may be refunded if they don't have to pay capital gains tax on the sale of the property (for example, because it was their main residence).

Only an [Australian resident entity](#) can obtain a clearance certificate. Solicitors, tax agents or other representatives of the vendor can apply on the vendor's behalf.

An Australian resident entity is one that is an Australian resident for tax purposes. This isn't the same as the definition of residency for immigration purposes, for the Foreign Investment Review Board (FIRB) applications to buy Australian property, or for social security purposes.

Conveyancers, real estate agents and others charging a fee for services (but who are not legal practitioners or registered tax agents) should obtain a completed paper PDF version of the clearance certificate form from the vendor. They can then use the details on the paper form to complete the online form, ensuring faster processing, as part of the settlement process.

Use the form [Capital gains withholding clearance certificate application paper form instructions – for Australian residents](#) .

If you need help to work out your residency, see [Work out your residency status for tax purposes](#).

A clearance certificate only applies to the entity specified on the certificate. If an asset has multiple vendors, each vendor will need to show the purchaser a clearance certificate to ensure amounts are not withheld.

It's valid for 12 months from the date issued, so the vendor may be able to use it for multiple disposals of real property that occur within the 12 month period. The vendor doesn't have to reapply to us each time they dispose of a property.

It may be provided to the purchaser at any time during the transaction, but must be provided to the purchaser by settlement.

When to obtain a clearance certificate

An entity may apply for a clearance certificate at any time they are considering the disposal of taxable Australian real property. This can be before the property is listed for sale.

You should apply for a clearance certificate online **at least 28 days** before you require it.

To avoid possible delays with settlement, the certificate can be provided to the purchaser at any time during the transaction but must be provided at or before settlement.

How long it takes

We issue clearance certificates within 28 days of receiving the application.

Higher risk and unusual cases may also require greater manual intervention, which could take longer.

If you lodge your application close to the settlement date, we cannot guarantee we can process it by the settlement date as we will not disadvantage those other applicants who applied earlier by delaying their application to process yours.

Where we send the certificate

Clearance certificates will be sent by email if an email address is provided in the application. Care should be taken to ensure that the email address supplied is current and correct to ensure a quick response. Otherwise clearance certificates will be mailed to the vendor and the vendor's contact using the addresses provided in the application.

To avoid unanticipated delays, vendors seeking a clearance certificate should apply through the online system as early as practical in the sale process.

Individual vendors, can obtain a copy of their clearance certificate outcome online:

- Visit **myGov** and go to **ATO online services**
- then, under the **My profile** menu, go to **Communication**
- then **History**.

Valid clearance certificate

A clearance certificate is valid for 12 months from the date of issue. It's only valid for the listed vendor and clearance certificate period on the certificate.

As long as the clearance certificate is provided by the vendor to the purchaser during the time specified on it, and that this is before settlement occurs, then it does not matter how long into the future the settlement may be. The purchaser does not have to withhold.

All parties on the Certificate of Title will require a clearance certificate. For example, joint tenants / tenants in common will need to fill out a

form each. It is the vendor's responsibility to provide the purchaser with the clearance certificate and ensure it's valid.

What name should be on the clearance certificate

Vendors must ensure the details on their clearance certificate application are accurate, so the clearance certificate issues in the correct name as that shown on the Certificate of Title of the property.

For the purchaser to rely on the clearance certificate, we require the following three conditions be met:

- the name of the vendor on the certificate must match the name on the certificate of title – see [Trusts and superannuation funds](#) for further clarification
- the date the certificate is given to the purchaser must be a date that falls within the time period shown on the clearance certificate
- the clearance certificate must be provided to the purchaser before settlement.

We will issue a clearance certificate in the name that is in our system. This may mean the name of the vendor on the clearance certificate doesn't match the name of the vendor on the certificate of title. In these cases:

- we accept the purchaser has fulfilled their obligation if the vendor supplies the purchaser clearance certificate and proof of a name change (for example, a marriage certificate, or a change of name certificate, issued from an Australian state or territory registry)
 - the clearance certificate issues in the legal name that we have on our systems
 - before applying for a clearance certificate ensure the vendor's name is correct on our systems and **update** if required
- we accept that purchasers have fulfilled their obligation if they have sighted a certificate where the First Name and Last Name are consistent with the name on the title
- an honorific match is not required
- a correct address on a certificate is not required to fulfil the purchaser's obligations

- it is not necessary to have the instrument number to a title deed on the clearance certificate – for example 'Trustee under instrument ###'
- it is not necessary to have the details of the trust on the clearance certificate – for example 'as Trustee for the XYZ Trust' (see **Trusts and superannuation funds** for further clarification)
- it is not necessary to have 'as executor for' or 'as legal representative for' on a clearance certificate to fulfil the purchasers obligations (where purchasing from a deceased estate), see [Deceased estates](#) for further clarification.

We will **not** reissue certificates in the above instances.

When a purchaser receives a clearance certificate from a vendor that is valid, they can rely on it and not withhold. There is no need for the purchaser to question the residency of the vendor.

If the clearance certificate doesn't meet the above conditions, the purchaser is required to withhold 12.5% of the purchase price.

Although it's not necessary for the purchaser to check the validity of clearance certificates with us before deciding to withhold the 12.5% amount from the purchase price, they could decide to do so.

You can phone us on **13 28 66** (Fast Key Code **4 2**) to check if the clearance certificate is valid. You'll need to provide the following information:

- the number from the Our reference field at the top of the certificate
- the vendor's name as it appears on the clearance certificate.

The call centre operative will then inform you whether the clearance certificate is valid.

Trusts and superannuation funds

The instructions for the capital gains withholding clearance certificate application provide specific details about how the form should be completed.

For trusts and superannuation funds, it is the entity that has legal title to the asset that applies for the clearance certificate. In most cases this is the trustee. It is the trustee – **in their own capacity as either a**

company or an individual – that should apply for the clearance certificate.

The trustee needs to use their own tax file number (TFN) and/or Australian business number (ABN) as the identifier (if they have one). It is recommended to include the Australian Company Number (ACN) as an attachment if they have one.

To avoid possible delays in issuing a clearance certificate ensure the [associates' details](#) [↗](#) in the [Australian Business Register](#) [↗](#) are updated with the current corporate trustee details. If a corporate trustee does not have a TFN, include an attachment in the application which provides the details of the relevant trust.

The certificate will be issued in the name as it appears on our system. We accept the purchaser has fulfilled their obligation if the vendor can show that the entity on the clearance certificate is the trustee of the trust (for example, copy of the trust deed).

This may be needed where our system contains 'The trustee for ABC Trust' whereas the title contains 'XYZ as the trustee for ABC Trust', or it has the trustee name only on the clearance certificate.

Consolidated groups and multiple entry groups

Withholding and intra-group transactions

A member of a consolidated group or multiple entry groups that purchases from another member of the group an asset to which the withholding applies is still required to comply with the withholding obligation.

Entity obtaining the clearance certificate

We'll issue a clearance certificate to the head company or provisional head company of the group which includes the members of the group as an attachment.

We rely upon the group membership information as recorded on our systems. If group membership has changed, it's up to the head company to notify us of these changes before making a clearance certificate request.

Alternatively, subsidiary entities can, in their own right, apply for a clearance certificate and have one issued in their own name.

The contract is for longer than 12 months

There may be instances where the settlement date is after the expiry date on the vendor's clearance certificate. For example, where an off-the-plan apartment is acquired and the contract period is greater than 12 months.

The purchaser may rely on the clearance certificate being valid as long as the date it's made available to the purchaser, is within the clearance certificate period stated on the certificate.

Do the rules apply if the market value of the asset acquired is exactly \$750,000?

Yes, the transaction will only be excluded from the rules if the market value of the taxable Australian real property or company title interest acquired is less than \$750,000.

Estimated market value \$750,000 or above

If the vendor is uncertain whether the \$750,000 threshold will be reached (for example, because the property is going to auction or a sales contract is yet to be signed) the vendor may wish to be conservative and apply for a clearance certificate. If the property is then sold for less than \$750,000, the vendor doesn't need to provide the purchaser with the clearance certificate.

Selling property with multiple titles

Where each parcel of real property sold is subject to a separate title, each is considered a separate CGT asset.

Example – separate CGT assets

Bob owns a small farm which consists of three separately titled blocks, each valued at \$700,000 by an independent valuer, but they are not able to be sold separately under the farm's land planning permit. As a separate asset, all three titles would come within the exclusion of subsection 14-215(1) of the *Tax Administration Act 1953* as each has a market value less than \$750,000. This is the case regardless of whether there are one or multiple contracts involved for the sale of the three titles.

Any restrictions imposed by planning permits on the titles do not change the fact that each parcel of real property is on a separate title, hence recognised as a separate asset.

When we withdraw a clearance certificate once it has been issued

We may withdraw a clearance certificate at any time if we obtain further information indicating that the vendor is a foreign resident.

This is to ensure that the vendor is not able to use the clearance certificate where we determine they have no entitlement to it.

We would expect that the withdrawal of a clearance certificate, once issued, would only occur in very rare situations given the checks and processes that have been put in place when issuing them.

Where a purchaser has, in good faith, not withheld from the purchase price on the basis of being provided with a clearance certificate prior to settlement, the purchaser will have met their obligations under the withholding rules.

Any subsequent decision by us to withdraw the clearance certificate from the vendor doesn't alter the fact that the purchaser had correctly complied with the withholding provisions at the time of settlement.

The purchaser will not be subject to any interest or penalty for failure to withhold in these circumstances, as at no stage was the purchaser required to withhold, given the vendor had produced a clearance certificate prior to settlement.

When the vendor provides a fraudulent clearance certificate


If a purchaser receives a document that appears to be a genuine and valid clearance certificate, and in good faith relies on that document to not withhold, we will not pursue the purchaser for the withholding.

If the document is subsequently found to be fraudulent, we will hold the vendor liable for making a false and misleading statement and may prosecute them.

Deceased estates

We have set out in a legislative instrument that no withholding (and hence no clearance certificate) is required in the following circumstances:

- a beneficiary acquires ownership of the relevant asset under the deceased individual's will, by operation of an intestacy law etc – for example, the name on the title deed is Joe Smith who is executor for Mary Smith estate
- a beneficiary acquires ownership of the relevant asset from the legal personal representative (executor/trustee) of the deceased individual in a manner not described above
- the property devolves to the legal personal representative (executor/trustee) following the death of the individual
- a surviving joint tenant acquires the deceased joint tenant's interest in a CGT asset. Where the title deed is under the surviving joint tenant's name only, a clearance certificate is required.

The operation of the Instrument extends to circumstances where assets pass to beneficiaries of a testamentary trust. For more information, see [PAYG Withholding variation for foreign resident capital gains withholding payments – deceased estates and legal personal representatives](#) .

Any other transfer or disposal of the relevant asset by the legal personal representative will create a withholding obligation. For example, the legal personal representative (executor/trustee) may decide to transfer or dispose of the relevant assets to a third party.

Situations involving mortgagors and mortgagees

This concerns situations where a mortgagor (borrower) has borrowed funds from a mortgagee (creditor, for example a bank), that mortgagor is unable to repay the loan and the mortgagee requires them to sell the secured asset which is subject to withholding (referred to as property in this section).

There are three situations where this commonly applies:

- **Situation 1** – the mortgagor retains title to the sale as the mortgagee has not repossessed the title to the property but has ordered its sale.
- **Situation 2** – where the mortgagee does take possession of the property and sells in that capacity, but there is no transfer of title

from mortgagor to mortgagee.

- **Situation 3** – the mortgagee has repossessed and taken title to the property from the mortgagor. This is commonly known as a foreclosure. In this situation there are two transactions where foreign resident capital gains withholding may apply
 - the transaction concerning the transfer of title from the mortgagor to the mortgagee (generally deemed to be a sale of the property at market value)
 - the transaction concerning the transfer of title from the mortgagee to the ultimate purchaser.

Applying for the clearance certificate or vendor variation

The entity with the title to the property is required to obtain the clearance certificate so foreign resident capital gains withholding won't apply.

In situation 1, the mortgagor remains the legal owner of the property. Therefore it is the mortgagor who has to obtain the clearance certificate and ensure it is provided to the ultimate purchaser for foreign resident capital gains withholding not to apply.


In the event the mortgagor doesn't cooperate with the mortgagee, then the mortgagee, as a creditor, can apply for a foreign resident capital gains variation to have the withholding reduced to the extent that the amount it is owed would not be covered by the sale proceeds if an amount was withheld.

In situation 2, the mortgagee cannot obtain a clearance certificate as they are not the legal owner of the property. However, the mortgagee can apply for a foreign resident capital gains variation to have the withholding reduced to the extent that the amount it is owed would not be covered by the sale proceeds if an amount was withheld.

There is no specific requirement as to who physically provides the clearance certificate to the purchaser. Therefore, with both situation 1 and 2, if the mortgagor, as vendor, obtains the clearance certificate, then provides it to the mortgagee, and the mortgagee provides it to the purchaser the ultimate purchaser can verify that the clearance certificate issued to the vendor is valid so long as it matches the name on the certificate of title.

In situation 3, for foreign resident capital gains withholding not to apply, clearance certificates are required to be provided to the purchasers for both transactions, that is:

- repossession by the mortgagee from the mortgagor – the mortgagor, as the vendor, is the party that has title of the property and therefore would obtain the clearance certificate (as in situation 1, if the mortgagor doesn't co-operate in this regard, the mortgagee, as a creditor, can apply for a foreign resident capital gains variation)
- sale of the property by the mortgagee to the ultimate purchaser (as the mortgagee has title to the property it is mortgagee that would obtain the clearance certificate).

For more information, see [PAYG Withholding variation for foreign resident capital gains withholding payments - no residue after a mortgagee exercises a power of sale 2020](#) .

When the purchaser should withhold

For the purpose of this part it is assumed that the entity taken to be the vendor is not entitled to a clearance certificate and therefore foreign resident capital gains withholding applies.

In situation 1, the mortgagor remains the legal owner of the property. Therefore, if the mortgagor doesn't have a clearance certificate, the mortgagee is required to withhold. If either the mortgagor, as vendor, or the mortgagee, as creditor, have applied and been granted a foreign resident capital gains withholding variation, the reduced rate of withholding specified in the variation notice applies.

In situation 2, the purchaser of the property would need to withhold at the 12.5% rate unless the mortgagee has obtained a foreign resident capital gains variation to have the withholding reduced to the extent that the amount it is owed would not be covered by the sale proceeds if an amount was withheld. Where a variation has been obtained by the mortgagee, the purchaser withholds at the rate specified in the variation notice provided by us to the mortgagee.

For situation 3, both transactions have to be considered:

- repossession by the mortgagee from the mortgagor – foreign resident capital gains withholding applies to this transaction with the mortgagee (creditor) having to withhold the 12.5% foreign resident capital gains withholding unless either the mortgagor, as

vendor, or the mortgagee, as creditor, have applied and been granted a foreign resident capital gains withholding variation.

- sale of the property by the mortgagee to the ultimate purchaser – foreign resident capital gains withholding would apply. Therefore, unless the mortgagee has obtained a foreign resident capital gains withholding variation, the ultimate purchaser is required to withhold at a rate of 12.5%.

Exceptions

There may be a situation where the mortgagee's name is not on the title as registered proprietor (although the mortgage will be listed as an interest on that title). This is because the mortgagee has not repossessed the property. However, the contract of sale will show the vendor as a mortgagee in possession exercising a power of sale under the mortgage.

With respect to paying the foreign resident capital gain's withholding, the name of the vendor on the purchaser payment notification form must be the mortgagor (borrower) as the mortgagee (creditor) has never taken title to the asset. This ensures that the foreign resident capital gains withholding credit that arises correctly goes to the borrower which is also the entity that is required to declare the capital gain.

The company is insolvent or under external administration

If the entity from which the asset is acquired is a company that satisfies any of the conditions in paragraph 161A(1)(a) of the *Corporations Act 2001* the transaction is excluded. The purchaser will not have a withholding obligation. This exclusion applies broadly; it is not limited to transactions involving assets for which there is a receiver.

Although there is no need to provide a clearance certificate to the purchaser in this instance, the purchaser may want to see evidence from the company or mortgagee that the exclusion applies to support their decision not to withhold.

On sale of property with no immediate transfer of title

A vendor may dispose of a property subject to the withholding regime before they have taken ownership of it. This is also known as an 'on-sale'.


Company A signs a contract to sell a property for more than \$750,000 to company B. At this time company B has not taken ownership of the property from company A. The legal ownership of the property remains with company A. Company B's name is not recorded against the property at the Land Titles Office. Prior to the settlement with company A, company B enters a contract with company C for disposal of the property. As a result of this contract company C agrees to acquire the property and undertake the settlement with company A.

The clearance certificate is required from company A to company C.

Relationship breakdown

There is no need for a clearance certificate in these circumstances as long as:


- the transfer happens under the *Family Law Act 1975* or under a State law, Territory law or foreign law relating to breakdowns of relationships between spouses
- the transferee possesses a copy of the relevant documentation specified in subsection 126-5(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) by the time of the finalisation of the transfer, showing that the asset was acquired in accordance with subparagraph 3(i).

For more information, see [PAYG Withholding variation for foreign resident capital gains withholding payments – marriage or relationship breakdowns](#) .

Income tax exempt entities

There is no need for the entity to provide a clearance certificate where the entity provides the purchaser with evidence that they are an income tax exempt entity. This should either be:

- a private ruling confirming its income tax exemption valid for the year in which the transaction is occurring
- documentation showing that the entity is endorsed for income tax exemption as a registered charity under item 1.1 of section 50-5 of the *ITAA 1997*.

For more information, see [PAYG Withholding variation for foreign resident capital gains withholding payments – income tax exempt entities](#) .

Government authorities and not-for-profit organisations

The withholding applies to all transfers of property unless they are specifically exempted.

Government authorities and not-for-profit organisations are not specifically exempted from the withholding and must obtain a clearance certificate or apply for a variation otherwise the foreign resident capital gains withholding will apply.

Vendor declarations

For all other asset types subject to foreign resident capital gains withholding, the vendor may provide the purchaser with a vendor's declaration to specify withholding isn't required on the acquisition of the asset. There are two types of vendor declarations:

- residency declaration
- not an indirect Australian real property interest declaration.

Trusts and superannuation funds

The trustee of a trust or superannuation fund completes the vendor application in their own capacity as either a company or an individual if the following apply:

- they are the entity that has legal title to the asset
- there is no mention of the trust or fund or 'in holding the property on trust'.

Residency declaration for transactions that are not real property

Where the purchaser believes the vendor may be a foreign resident, they can request the vendor make a declaration confirming their Australian tax residency.

Purchasers may believe the vendor is a foreign resident if either:

- they know the vendor has an address outside of Australia
- sale proceeds are to be paid to a place outside of Australia.

When a vendor makes a declaration stating they are an Australian tax resident, the purchaser will not treat them as a foreign resident.

Alternatively, the vendor may voluntarily provide a declaration to the purchaser without being asked to supply it.

Purchaser can rely on the declaration

The purchaser may rely on a residency declaration supplied by the vendor, where the purchaser is acquiring assets that are not Australian real property. When a purchaser receives a vendor declaration, they will not withhold any amounts unless they know the declaration is false.

Not an indirect Australian real property interest declaration

A vendor may provide the purchaser with a declaration confirming either:

- that the membership interests they are disposing of are not indirect Australian real property interests
- where an option is granted, that the membership interests subject to the option are not indirect Australian real property interests.

This is allowed, as the vendor would be in the best position to determine if the membership interest being disposed of, or subject to an option, is an indirect Australian real property interest.

Purchaser can rely on the declaration

A 'Not an indirect Australian real property interest' declaration supplied by the vendor may be relied on by the purchaser where the purchaser is acquiring the membership interests in an Australian entity or an option over the membership interests specified in the declaration.

Where a valid declaration is provided there will be no obligation on the purchaser of the membership interest, or grantee of the option transaction, to withhold. A declaration may be relied on unless the recipient knows the declaration is false.

Interests on the stock market

Where a vendor is disposing of the interest in the Australian entity on an approved stock exchange (such as the ASX or Chi-X), there is no need for the declaration to be provided. This is because interests disposed of on an approved stock exchange are an 'excluded asset' for the purposes of this withholding.

This also applies to transactions that occur on a crossing system – for example, disposal of shares in dark pools.

When the vendor doesn't supply a declaration when requested

If the vendor doesn't supply a declaration when requested, the purchaser should withhold 12.5% from the purchase price at settlement.

Valid declaration from a vendor

A vendor's declaration is valid for six months from the date it's signed by the vendor. It's only valid for the listed vendor and specified period on the declaration. The specified period may start retrospectively but cannot exceed six months from the date the declaration is signed by the vendor.

It's the vendor's responsibility to provide the purchaser with a declaration and ensure the date that it was provided to the purchaser is within the six-month validity period of the declaration.

For the purchaser to rely on the declaration, the:

- name of the vendor on the declaration must match the name of the owner of the asset (unless proof of name change is provided)
- date the vendor provides the declaration to the purchaser must be a date that falls within the specified period on the declaration.

If the declaration doesn't meet the above conditions, the purchaser is required to withhold 12.5% of the purchase price.

How to declare

There is no approved form that can be completed by the vendor for a declaration. But we have a template that can be used for this purpose:

Download [Foreign resident capital gains withholding – vendor declaration \(PDF, 222KB\)](#) 

Multiple vendors

A declaration is only valid for the vendor specified in the declaration. If an asset is acquired from multiple vendors, each vendor would need to provide the purchaser with their own declaration, to ensure the withholding obligation does not apply to each of them.

Declarations and the disposal of real property

A vendor can't use a declaration to avoid having the purchaser withhold the 12.5% withholding in relation to the disposal of real property.

False vendor declarations

A purchaser can rely upon the declaration unless they know it to be false.

A purchaser will be treated as knowing a vendor declaration is false where they have specific knowledge of this fact. A purchaser will have such knowledge when they are a party to the fraud committed by the vendor, or when they have other information that indicates the declaration is implausible. The fact the purchaser may have reasonable grounds to doubt the accuracy of the declaration doesn't, of itself, and without further information, mean the purchaser can't rely on it.

Penalties

A vendor that makes a false or misleading declaration must pay a penalty to the Commissioner. The amount of the penalty varies depending on the severity of the offence.

The penalty is:

- 120 penalty units where the vendor has knowingly made a false or misleading declaration
- 80 penalty units where they have recklessly made a false or misleading declaration
- 40 penalty units where the declaration is false or misleading as a result of the vendor failing to take reasonable care.

Variations

Vendors can apply for a variation where all of the following apply:

- they're not entitled to a clearance certificate

- a vendor's declaration is not appropriate
- there is a reason why 12.5% withholding is too high taking into account the actual Australian tax liability on the sale of the asset.

Reasons for a variation include:

- the vendor will not make a capital gain on the transaction (for example, because they will make a capital loss or a CGT roll-over applies)
- the vendor will not have an income tax liability (for example, because of carried-forward capital losses or tax losses)
- a creditor of the vendor has a mortgage or other security interest over the property, and the proceeds of sale available at settlement are insufficient to cover both the amount to be withheld and to discharge the debt the property secures
- a creditor acquires legal title to the property (that is, becomes the purchaser) as a result of an order for foreclosure, and its security would be further diminished as a result of having to comply with the withholding obligation.

If a vendor does not provide a variation at or before settlement, the purchaser must withhold 12.5% of the purchase price for transactions above \$750,000. The FRCGW amount has not been withheld in error, either in part or in full, where the vendor is entitled to a variation and did not obtain one before settlement.

The vendor will need to lodge an income tax return and:

- claim a credit for the withheld amount
- declare their capital gain (declaring an amount of '0' if there is no capital gain or there was a capital loss).

A credit for the amount withheld for foreign resident capital gains is applicable to the year the contract was signed. Therefore, it may take some time before the vendor can lodge the income tax return to declare the capital gain and claim any available credit for the amount withheld. Any excess amount withheld may be refunded after the income tax return is assessed.

Foreign residents claiming the main residence exemption as a reason for the variation

A law change on 12 December 2019 means foreign residents can no longer claim the CGT main residence exemption as the reason for their variation unless, at the time of the CGT event, they were a foreign resident continuously for six years or less and during that time one of the following occurred:

- either the foreign resident, their spouse, or their child under 18, had a terminal medical condition
- their spouse, or their child who was under 18 years of age, dies
- the CGT event happened because of a formal agreement following your divorce or relationship breakdown.

If the foreign resident dies, the change also applies to:

- legal representatives, trustees and beneficiaries of deceased estates
- surviving joint tenants
- special disability trusts

When the change applies

The change applies to foreign resident vendors for properties acquired at or after 7:30 pm (AEST) 9 May 2017. The CGT main residence exemption no longer applies to disposals from that date unless any of the life events (listed above) occur within six continuous years of that individual becoming a foreign resident for tax purposes.



The change only applies if the person is not an Australian resident for tax purposes at the time of the disposal, that is, when the person signs the contract to sell the property. Their residency status in earlier income years will not be relevant. There will be no partial CGT main residence exemption available in these circumstances.

If a person has always been a foreign resident for tax purposes, it is unlikely they have ever resided in the property as their main residence and are unlikely to meet the requirements for the CGT main residence exemption.

Legislative Instruments


We have issued class variations for:

- [deceased estates and legal personal representatives](#) 

- [income tax exempt entities](#) 
- [marriage or relationship breakdowns](#) 
- [no residue after a mortgagee exercises a power of sale](#) 

If any of these class variations apply, the withholding rate is varied to nil and it is not necessary to apply for a variation.

How to apply

To apply for a variation, the vendor, the vendor's representative or vendor's creditor needs to complete the online [Variation application for foreign residents and other parties](#) .

An application for a variation should be completed well in advance of the settlement date to ensure there is enough time to provide the information required to finalise the application.

Conveyancers, real estate agents and others charging a fee for services (but who are not legal practitioners or registered tax agents) should obtain a completed paper PDF version of the form from the vendor. They can then use the details on the paper form to complete the online form, ensuring faster processing, as part of the settlement process.

You can complete the [Foreign resident capital gains withholding rate variation paper application](#).

For more information, see *LCR 2016/5 Foreign resident capital gains withholding regime: the Commissioner's variation power*

In the majority of cases (where we have all the required information), the variation notice will be issued within 28 days.

Variation notices will be sent by email if an email address is provided in the application. Otherwise, notices will be mailed to the vendor and the applicant using the addresses provided in the application. The variation notice should be shown to the purchaser before settlement to ensure the reduced withholding rate applies.

Calculating the reduced rate of withholding

Vendors need to calculate their reduced rate of withholding. This could be a rate between nil and 12.49%.

The varied rate we approve will depend on the information provided by the vendor in their application.


Unit price fluctuations

If the indirect interest in taxable Australian real property is in a wholesale trust that has unit values that fluctuate daily, then there is a risk that the variation would become invalid as the unit selling price exceeds the unit price specified in the conditions of the variation notice we issued.

As a solution to this potential problem, the variation condition we provide on the variation notice can provide a number of alternative prices, with a differing variation rate applying to each. If you are in this situation you should provide information in relation to possible price differences and what you believe would be an appropriate variation rate within that price range – this information can be supplied in the attachment to the variation application.

Multiple vendors

A variation notice applies to the specified vendor and applicable asset on the notice. If an asset is acquired from multiple vendors, each vendor will need to supply the purchasers with a separate variation notice if a reduced rate of withholding is to apply in respect of their interest in the asset.

For more information, see [PAYG Withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple entities](#) 

Valid variation notice

A variation notice is valid up to and including the expiry date on the notice for the listed vendor and applicable asset on the notice.

It is the vendor's responsibility to provide the purchaser with the variation notice and ensure it's valid at the time of settlement.

For the purchaser to rely on the variation notice, the:

- name of the vendor and applicable asset details on the notice must match those on the certificate of title or other asset ownership documentation (proof of name change should have been provided to us at the time of applying as all variations are manually processed)

- the settlement date must be on or before the expiry date on the variation notice.

When a purchaser receives a valid variation notice from a vendor, they can rely on it and withhold amounts from payments at the reduced rate and pay by completing the **Foreign Resident Capital Gains Withholding Purchaser Payment Notification** form.

If the variation notice doesn't meet the above conditions, the purchaser is required to withhold 12.5% of the purchase price.

A purchaser can check the validity of a variation notice with us by phoning **13 28 66** (Fast Key Code **4 2**) prior to deciding whether to withhold the 12.5% amount from the purchase price. To confirm the validity, the purchaser must provide the:

- BET number from the 'Our reference' field at the top of the notice
- vendor's name, varied rate and applicable asset details as they appear on the notice.

Calculating the withholding

Purchase price vs market value

With taxable Australian real property, the market value determines whether this withholding measure needs to be considered.

In most cases, the market value of a property should be the same as the purchase price. Where the purchase price has been negotiated between the vendor and the purchaser, acting at arm's length, we will accept the purchase price as a proxy for market value.

However, there could be circumstances where the market value is different to the stated purchase price (for example, where the vendor and purchaser are related parties and did not deal with each other at arm's length). In such cases, we won't accept the purchase price as a proxy for market value and the purchaser will need to seek a separate expert evaluation.

Purchase price vs first element of the cost base

The legislation provides that the purchaser applies the 12.5% withholding rate to the first element of the cost base of the asset the vendor is disposing of.

The first element of the cost base is a tax technical term, which is the money paid, or required to be paid, to acquire the asset and the market value of any property given, or required to be given, in respect of acquiring the asset.

In most cases, the first element of the cost base should be equivalent to the purchase price. Where the purchase price has been negotiated between the vendor and the purchaser, acting at arm's length, we will accept the purchase price as a proxy for the first element of the cost base.

Where a sales contract contains assets both subject to this withholding measure and not subject to this withholding measure, the purchaser and vendor can decide to come to an agreement as to what are the respective market values of each asset, in determining whether withholding should be imposed upon that share of the purchase price for each asset. Where the parties to the contract are not dealing at arm's length an independent valuer may need to be included in the valuation process.

Multiple properties in one transaction

A vendor may be disposing of multiple properties in one transaction, the combined value of which exceeds \$750,000. The withholding is based on the market value of a property being disposed of not a combination of all the properties being disposed of, therefore each property needs to be assessed separately for withholding

No additional payment on top of the agreed purchase price

The obligation for the purchaser to withhold an amount and pay it to us isn't an additional payment on top of the agreed purchase price.

The withholding amount is taken from the purchase price the purchaser has agreed to pay the vendor.

How withholding applies to deposits or instalments

Withholding is not required from deposits paid on signing of the contract.

If payments are to be made in multiple instalments across the contract period, withholding should only occur when the final payment is made

at settlement. The withholding amount is still calculated using the full purchase price of the asset.

When the contract doesn't settle

If for some reason the contract is not completed (settled), there is no obligation on the purchaser to withhold. This is because the vendor has not received the agreed purchase price for the asset.

Multiple purchasers (the ATO online form will help in this calculation)

Where there are multiple purchasers, each purchaser doesn't look at their percentage interest in isolation to the other purchasers in determining whether they should withhold.

Each purchaser must withhold in proportion to their percentage of the total purchase price.

Where the asset being disposed of is taxable Australian real property, the market value of all purchasers' interests must be aggregated in examining whether the \$750,000 market value threshold has been reached.

If the aggregated purchase price is \$750,000 or more, each purchaser must withhold in proportion to their percentage of the total purchase price.

Example – Multiple purchasers

You are purchasing a commercial property jointly with another entity. Your share of the acquisition is 40%, for which you are paying \$400,000. This means the total property purchase price would be \$1 million. Even though your purchaser's interest is below the \$750,000 threshold, the property as a whole exceeds the \$750,000 threshold so you will need to withhold.

Each purchaser will receive a different payment reference number, and a specified amount / rate to be paid via the online form. You may provide one cheque together with the details on how to apportion this amount.

Multiple vendors (the ATO online form will help in this calculation)

If there are multiple vendors disposing of the asset, it's the total market value of the asset that determines whether withholding is required by the purchaser.

If the purchaser hasn't been provided with a clearance certificate, vendor declaration or a variation from any of the vendors, the purchaser must withhold 12.5% of the purchase price. The amount of withholding will be in proportion to each vendor's interest in the asset.

Where there are multiple Australian vendors disposing of the asset, each vendor should provide the purchaser with a separate clearance certificate which is to be in their name only.

Where one (but not all) of the vendors provides a clearance certificate or vendor declaration to the purchaser, the withholding obligation still applies, as there is still a foreign resident vendor to the transaction. The amount of withholding is still on the entire first element of the cost base of the asset, not just the portion attributable to the relevant foreign resident vendor's interest in the asset.

We recognise in this situation, any vendors subject to the withholding would apply for a variation to ensure the withholding amount better reflected the foreign resident vendor's tax liability. They would receive a reduction in the withholding rate accordingly.

To reduce the need for vendors to apply for variations in these situations, the purchaser may withhold in accordance with each vendor's proportional interest in the purchase price, subject to any clearance certificate, vendor declaration or vendor variation being provided prior to settlement.

For more information, see [PAYG Withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple entities](#) .

The following examples are from the perspective of a purchaser determining their obligation to withhold. In all instances, it's assumed the purchase price is \$750,000 or more.

Example – Joint owners, but only one vendor is an Australian resident

The purchaser has to withhold as there is a foreign resident. The withholding is based on the full purchase price of the property. The purchaser would need to see the clearance certificate from the Australian resident vendor. Otherwise, they would have to withhold on their interest within the property they are disposing of.

If a clearance certificate is provided before settlement, then the purchaser doesn't have to withhold. The withholding would be on the full purchase price of the property – but we allow the withholding to be calculated only on the foreign resident's interest in the property.

Example – Foreign resident vendor provides a variation

The circumstances are identical, but now the foreign resident vendor shows a variation notice and the Australian vendor provides a clearance certificate. There is no withholding on the Australian resident's interest in the property. There is withholding on the foreign resident's interest in the purchase price of the property – but the rate of withholding is the withholding rate as specified on the variation notice issued by us to the foreign resident vendor, not 12.5%.

Example – Multiple foreign resident vendors

As the property is being sold by foreign residents, the purchaser knows they must withhold. They have not received a clearance certificate, so must assume all the vendors are foreign residents.

With respect to each foreign resident vendor, the amount of withholding is based on their specific interest in the property – their share of the purchase price.

The purchaser must consider if any of these vendors has supplied a variation notice. If no variation notice is received, the withholding is 12.5% of the contract purchase price, with each

vendor being subject to an amount reflective of their interest in the property being sold.

If variation notices are provided by some or all of the foreign resident vendors, the purchaser must calculate the specific withholding rate applicable to each vendor.

For vendors that don't supply a variation notice, the withholding is 12.5% of their share of the contract purchase price, reflective of their interest in the property being sold.

For vendors that supply a variation notice, the rate of withholding applicable to their specific interest in the purchase price of the property will be the withholding rate as specified on the variation notice issued by us to that particular foreign resident vendor. It may be the purchaser has to withhold 8% from one vendor, and 3% from another vendor.

When the purchaser fails to withhold

If the purchaser fails to withhold when they should, a penalty may be imposed by the Commissioner, equal to the amount that was required to be withheld and paid. General interest charges will also be applied.

Goods and services tax

For some transactions, it may be necessary to determine if the purchase price needs to be adjusted for GST in determining the price on which the withholding is applied.

Where a purchaser isn't registered for GST or the supply of the asset isn't a taxable supply (for example because the vendor isn't registered for GST or the supply is input taxed), or the purchaser isn't entitled to any input tax credit, the GST inclusive purchase price payable by the purchaser may be used in determining how much withholding is required.

Where the purchaser is registered for GST and the transaction is a taxable supply, and the purchaser is entitled to an input tax credit, the GST inclusive purchase price less the input tax credit may be used by the purchaser in determining how much withholding is required.

The sale of existing residential premises (but not commercial residential premises or new residential premises) is input taxed and

therefore not a taxable supply. Where the asset is shares (for example company title interests), the supply of shares is input taxed and therefore not a taxable supply.

The purchase price can't be used as a proxy for market value if the purchaser has paid a premium, or the parties have not dealt with each other at arm's length.

An exception – the margin scheme

If the margin scheme is used, a purchaser cannot claim input tax credits on that acquisition, even if they are registered for GST and intend to use the purchased property for a creditable purpose.

In these instances, a GST registered purchaser should calculate the 12.5% withholding by using the GST inclusive price, the same as non-registered purchasers.

Leases

Acquisition of a lease

The acquisition of a lease with a market value of \$750,000 or more from a foreign resident lessor would be subject to the 12.5% withholding.

Withhold amount if paying a premium for the lease

Withholding is only required if the market value of the lease is \$750,000 or more. If a lessee has paid a premium for a lease, that premium is part of the first element of the cost base of the leased asset upon which the 12.5% withholding applies.

Rent and outgoings

Rent and outgoings are not included in determining the \$750,000 market value and do not form part of the first element of the cost base of a lease.

Options

The acquisition of an option to acquire an asset subject to this withholding measure from a foreign resident would be subject to the 12.5% withholding unless the vendor provides the purchaser with a

valid [declaration](#) or another [exception](#) or [exclusion](#) applies. However, where the market value of the option being acquired is less than \$8 no withholding applies and no Purchaser payment notification form is required to be submitted by the purchaser.

Where the option involved is a put option, the grantee is not required to withhold an amount because the grantee of a put option has acquired a right to sell, not an option to acquire, the underlying asset.

Where a purchaser acquires the asset as a result of exercising an option, the amount to which the 12.5% withholding applies is the amount paid for the asset and the market value of any property they gave for the option (or to renew or extend the option), but excluding what the purchaser already paid for the option.

When an option contract is entered before 1 July 2016 but exercised after that date

When the option was granted has no bearing on the foreign resident capital gains withholding implications. It is the time of exercise of the option that is the relevant point at which the grantee must consider whether the foreign resident capital gains withholding provisions apply to the amount they are paying the grantor.

Where the option is exercised on or after 1 July 2016 and the asset being acquired is a CGT asset subject to the withholding rules, then the withholding provisions do apply to the first element of the cost base of that relevant asset (we accept this is the purchase price of the asset where there is an arm's length transaction). This is the case even when the option was granted prior to 1 July 2016 or where the option contract doesn't consider foreign resident capital gains withholding.

The withholding is avoided if the vendor provides the purchaser with a valid [clearance certificate](#) or declaration, or another exception or exclusion applies.

A purchaser that withheld in accordance with their federal income tax obligations would be protected by sub-section 16-20(2) of Schedule 1 to the *Taxation Administration Act 1953*. This provides that a purchaser's liability to pay the purchase price is reduced by the withholding amount paid to the Commissioner.

Earnouts

How the rules apply will depend on whether the earnout right is one of the following.

Look-through standard earnout rights

The purchaser is required to withhold and pay to the Commissioner 12.5% of the first element of the CGT asset's cost base just after the acquisition. The first element of the CGT asset's cost base doesn't include any financial benefit the purchaser provides under a look-through standard earnout right relating to the CGT asset.

The purchaser is also required to withhold and pay to the Commissioner 12.5% of the [market value](#) of the financial benefits provided by the purchaser under the earnout right, unless the entity receiving the financial benefit is not a [relevant foreign resident](#) at the time the financial benefit is provided.

Non-look-through standard earnout right

The purchaser is required to withhold and pay to the Commissioner 12.5% of the first element of the CGT asset's cost base. The non-look-through earnout right is property given by the purchaser in respect of acquiring the CGT asset. Therefore, the first element of the CGT asset's cost base includes the market value of the earnout right. The purchaser must ascertain the market value of the earnout right at the time of acquisition and include that value in calculating the 12.5% withholding.

The purchaser is not required to withhold 12.5% of the market value of any financial benefits provided by the purchaser under the non-look-through earnout right.

Look-through reverse earnout right

The purchaser is required to withhold and pay to the Commissioner 12.5% of the first element of the CGT asset's cost base just after the acquisition. The first element of the CGT asset's cost base is not reduced by the amount of any financial benefit that you receive under a look-through earnout right relating to the CGT asset.

Non-look-through reverse earnout right

The purchaser is required to withhold and pay to the Commissioner 12.5% of the first element of the CGT asset's cost base. However, the purchaser has acquired more than one asset. The non-look-through

earnout right is a separate CGT asset acquired by the purchaser and not subject to the withholding. Therefore, the first element of the cost base of the CGT asset that is subject to withholding is the amount of the purchase price that is reasonably attributable to that CGT asset.

Earnout rights do not affect the market value of the underlying asset

An earnout arrangement may be entered into at the time of sale of an asset where the vendor and purchaser do not agree on a fixed purchase price. However, the market value of an asset is not affected by the existence of an earnout right that is created at the time of the asset's sale.

The purchaser cannot use the upfront payment as a proxy for market value

Purchasers will need to ascertain the market value of the asset on a different basis, such as seeking an independent expert valuation.

Share issues / IPOs

The withholding obligation doesn't apply if the purchaser acquires shares as a result of being issued or allotted those shares through an Initial Public Offer (IPO) because the shares will not be indirect Australian real property interests.

An indirect Australian real property interest is a membership interest (for example, a share) held by one entity in another entity if certain additional conditions are met.

At the time the share issue transaction is entered into, the shares are not membership interests that the issuing company holds in **another** entity (they are membership interests in the issuing company itself), and therefore cannot be indirect Australian real property interests.

An option to acquire shares

The acquisition of an option to be issued new shares in a company would not be an option that is subject to the withholding on the basis that any shares that could be acquired via the exercise of the option would not be an indirect Australian real property interest.


Paying the withholding

A purchaser must pay us the withholding equal to 12.5% of the first element of the CGT asset's cost base (the cost base is generally equal to the purchase price). Where no money is paid or required to be paid, or the agreed amount is under market value, then the 12.5% withholding is on the market value of the CGT asset.

Note: The first element of cost base doesn't include any disbursements at settlement (for example, for council rates, water and sewer charges and strata levies). Therefore, the withholding amount is 12.5% of the purchase price before adjustment for disbursements.

The purchaser is liable to withhold and pay this amount. If this does not occur when it should, we will hold the purchaser liable.

When the payment is required

To pay the withholding to us, the purchaser must complete an online [Foreign resident capital gains withholding Purchaser Payment Notification form](#) .

Where there are multiple purchasers one form can be used if there are 10 or fewer purchasers, or purchasers can lodge a form individually.

Once a payment notification form is processed, a payment reference number (PRN) will be issued, along with a PDF icon that can be clicked on to obtain a downloadable payment slip and barcode to use at Australia Post.

Only one PRN is issued per purchaser payment notification form, even if multiple purchasers are supplied on the form.

The purchaser (or purchasers) must pay the withholding to us on or before the day they become the owner of the asset, and they require the PRN, payment slip and barcode to do this. Without these, the purchaser will not be able to make the payment at Australia Post.

We encourage purchasers to submit the payment notification form to us as early as possible, to ensure they have the payment reference number at settlement.

If the purchaser fails to obtain a PRN and pay the withholding when they become the owner of the asset, general interest charges will be imposed.

There is a short grace period from, and including the day of settlement, for the withholding to be paid in full. General interest

charges will accrue from the date of settlement if we don't receive the withholding within the grace period.

All parties should view the Purchaser payment notification form before settlement proceeds and should contact us if there are changes to the settlement date on the form.

Purchaser payment notification form

Purchasers are **not** required to notify us of a transaction if:

- the purchase price of the real property is less than \$750,000
- all vendors have supplied [clearance certificates](#)
- all vendors have supplied [vendor declarations](#)
- all vendors provide a [notice to vary](#) withholding set at 0%.

When an amount is required to be withheld, a foreign resident capital gains withholding purchaser payment notification form must be completed by all the purchasers involved in the sale. The purchaser will need to provide the details of the vendors and the asset in the application.

Once a payment notification form is processed, a PRN will be issued and a PDF icon they can click to obtain a downloadable barcode to use at Australia Post will be generated. It is recommended that the downloadable barcode always be printed to avoid keying errors.

Only one PRN is issued per purchaser payment notification form, even if multiple purchasers are supplied on the form.

The full payment can be made using the PRN or payment slip provided. Where two or more purchasers are included in the transaction, they can choose to make separate payments and use the same PRN or payment slip.

How to pay

There are 3 methods the purchaser can use to pay us.

1. Transfer the amount via electronic funds transfer (or BPAY®)

- Bank: Reserve Bank of Australia
BSB: **093 003**
Account number: **316 385**
Account name: ATO direct credit account
Reference: Your payment reference number

2. In person at Australia Post

- the purchaser will need the barcode supplied to them after lodgment of the Foreign resident capital gains withholding purchaser payment notification. The post office accepts cheques up to \$100 million.

3. Mail a cheque to us with the PRN (**Note:** Large withholders may pay the subdivision 14-D withholding amount by non-electronic means)

- **Australian Taxation Office**
Locked Bag 1936
ALBURY NSW 1936
Australia

After payment has been made

A receipt from either Australia Post or the ATO is proof the purchaser has made the payment and fulfilled their obligations.

A payment confirmation email or letter will be sent to the nominated contact on the purchaser payment notification form.

Confirmation will be sent by email if an email address is provided in the foreign resident capital gains withholding purchaser payment notification, otherwise it will be mailed to the address of the contact.

Vendors will need a copy of the payment confirmation and use this information to complete their tax return.

How to pay when travelling

We have an online version of the form, which provides an automatic PRN.

Only use this PDF form if you anticipate not having internet access:

- Foreign resident capital gains withholding purchaser payment notification paper form instructions

Compulsory acquisitions by government authorities

Certain Australian government authorities can exercise powers under State and Territory legislation for the compulsory acquisition of real

property. Generally the property is acquired, and ownership of the property passes, on the date that the acquisition is published in the relevant government gazette.

In the context of a compulsory acquisition certain practical difficulties arise in connection with determining whether or not there is an obligation to withhold and working out the withholding amount to be paid on or before the day the acquisition is published in the gazette. For example, the market value of the property being acquired may be the subject of a dispute at the time the acquisition is published.

Payment of withholding tax

Under section 14-200 of Schedule 1 to the *Tax Administration Act 1953*, the Australian government authority is required to pay the foreign resident capital gains withholding tax on or before the date that the authority became the property's owner.

Deferral of payment

Subsection 255-10(2A) of Schedule 1 of the *Taxation Administration Act 1953* allows the Commissioner to defer the time for payment of tax-related liabilities (including withholding tax) due and payable by a class of taxpayers. The Commissioner defers the payment by publishing a notice on our website. The Commissioner can defer the time for payment whether or not the liability has already arisen.

Notice

Until further notice, the Commissioner of Taxation has deferred the time for which the foreign resident capital gains withholding tax liabilities of an Australian government authority are due and payable where:

The exercise of the compulsory acquisition power is authorised under one or more of the following Acts:

- *Acquisition of Land Act 1967* (Queensland)
- *Land Acquisition (Just Terms Compensation) Act 1991* (New South Wales)
- *Land Acquisition Act 1969* (South Australia)
- *The Land Acquisition and Compensation Act 1986* (Victoria)
- *Land Acquisition Act 1993* (Tasmania)

- *Land Administration Act 1997* (Western Australia)
- *Land Acquisition Act 1994* (Australian Capital Territory)
- *Land Acquisition Act 1978* (Northern Territory)
- *Land Acquisition Act 1989* (Commonwealth of Australia).

For an Australian government authority that is exercising its compulsory acquisition powers under one or more of the above Acts in relation to a compulsory acquisition, the due date for payment of the foreign resident capital gains withholding tax is deferred to the earlier of:

- 14 days after agreement or final determination of the compensation payable
- 14 days after agreement to pay an advance amount of compensation.

As a consequence of this we will accept the government authority as meeting its obligation for the purposes of the withholding if it receives a valid clearance certificate from the vendor by the earlier of:

- 14 days after agreement or final determination of the compensation payable
- 14 days after agreement to pay an advance amount of compensation.

In terms of the amount of withholding it will be based upon the compensation amount paid that is equivalent to the first element of the CGT asset cost base (being that of the taxable Australian real property subject to the gazettal).

As a compensation amount could include a value for disturbance and professional expenses or other assets other than the property, the government authority would need to establish a market value break-up of the payment related to the property, and only withholding on that amount.

Penalties

A purchaser that fails to withhold as required and pay it to us may be subject to a penalty equal to 10 penalty units or the amount they failed to withhold.

We are obliged to give written notice to the purchaser of their liability to pay the penalty and the reasons for imposing the penalty.

The purchaser will also be subject to the **general interest charge** on any amounts not paid to us by the required date.

Foreign resident capital gains withholding and the tax return

The foreign resident vendor must lodge a tax return at the end of the financial year declaring:

- their Australian assessable income, including any capital gain from the disposal of the asset, or an amount of '0' if there was no capital gain or there was a capital loss
- whether the vendor will claim a credit for any withholding amount taken from their sale proceeds (for example, because they didn't provide the purchaser with a clearance certificate).

A credit may be refunded in the relevant tax return if they don't have to pay capital gains tax on the sale of the property (for example, because it was their main residence).

A foreign resident will need to apply for a TFN before they lodge an Australian tax return to ensure they can claim a credit for the amount withheld and paid to the ATO by the purchaser.

In certain circumstances, an early tax return may be submitted. If a foreign resident vendor is not eligible to submit an early tax return, they must wait until the end of the financial year to submit it and receive a tax credit for the withholding paid by the purchaser.


Applying the credit

We will only apply the credit to the vendor when the:

- purchaser has paid the withholding to us
- vendor has lodged an Australian income tax return claiming the credit.

We'll give vendors confirmation that a withholding payment has been paid on their behalf.

In situations where the contract is signed in one financial year but the purchaser pays the withholding in the next financial year, we will apply the Commissioner's Remedial Power to allow the vendor to claim the credit in the same tax return in which they need to declare the capital gain.

For more information, see [Taxation Administration \(Remedial Power – Foreign Resident Capital Gains Withholding\) Determination 2017](#) .

When the purchaser withholds but doesn't pay it to us

The vendor cannot claim a credit for the withholding until the purchaser pays the withholding to us.

We will promptly take action to collect from the purchaser any withholding amount not paid by the due date.

If the vendor is concerned the purchaser may not pay the withholding, the vendor should seek legal advice.

Amendments

A vendor may provide the purchaser with a clearance certificate or variation after the purchaser has submitted the purchaser payment notification.

Phone us on **13 28 66** (fast codes **4 2**) for referral to the relevant area who will try to help you resolve this situation.

More information

Law companion rulings

The following rulings describe how we apply the law:

- Foreign resident capital gains withholding regime: the Commissioner's variation power
- Foreign resident capital gains withholding regime: amount payable to the Commissioner
- Foreign resident capital gains withholding regime: options





Legislation and supporting materials

On 22 June 2017 [Treasury Laws Amendment \(Foreign Resident Capital Gains Withholding Payments\) Act 2017 \(Act No. 57 of 2017\)](#) .




received royal assent.



On 25 February 2016 the [Tax and Superannuation Laws Amendment \(2015 Measures No. 6\) Act 2016](#)  received royal assent.

The following information is available to help you meet your obligations:

- [Clearance certificate application for Australian residents](#) 
- Capital gains withholding clearance certificate application online form and instructions – for Australian residents
- [Variation application for foreign residents and other parties](#) 
- Foreign resident capital gains withholding rate variation application online form and instructions
- [Purchaser Payment Notification – Foreign resident capital gains withholding](#) 
- Foreign resident capital gains withholding purchaser payment notification online form and instructions
- [Foreign resident capital gains withholding payments \(webinar recording\)](#) 
- Capital gains tax withholding – a guide for conveyancers
- Foreign resident capital gains withholding – simplified Chinese
- GST at settlement

Legislative instruments

- Acquisitions from multiple entities – Federal Register of Legislation page [PAYG Withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple entities](#) 
- Deceased estates and legal personal representatives – Federal Register of Legislation page [PAYG Withholding variation for foreign resident capital gains withholding payments – deceased estates and legal personal representatives](#) 
- Marriage or relationship breakdowns – Federal Register of Legislation page [PAYG Withholding variation for foreign resident capital gains withholding payments – marriage or relationship breakdowns](#) 

- Exempt entities – Federal Register of Legislation page [PAYG Withholding variation for foreign resident capital gains withholding payments – income tax exempt entities](#) 
- No residue after a mortgagee exercises a power of sale – [Federal Register of Legislation page PAYG Withholding variation for foreign resident capital gains withholding payments - no residue after a mortgagee exercises a power of sale 2020](#) 

QC 48972

Capital gains withholding – a guide for conveyancers

If you are a conveyancer, find out about foreign resident capital gains withholding and what it means for vendors.

Last updated 15 May 2023


What is FRCGW?

Foreign resident capital gains withholding (FRCGW) applies to vendors disposing of certain taxable property under contracts entered into from 1 July 2016.

The FRCGW tax rate is 12.5%.

It applies to real property disposals where the contract price is \$750,000 or more.

For contracts that were entered into from 1 July 2016 and before 1 July 2017, even if they did not settle until after 1 July 2017, the FRCGW withholding tax rate is 10% and applies to real property disposals where the contract price is \$2 million and above.

Before assisting clients to meet the Foreign resident capital gains withholding (FRCGW) requirements, [conveyancers](#)  who are not legal practitioners or registered tax agents need to understand what they can or can't do under the *Tax Agent Services Act 2009* (TASA).

Background

Purchasers must withhold 12.5% of the purchase price and pay it to us if a vendor enters into a contract on or after 1 July 2017 and disposes of the following asset types:

- real property – taxable Australian real property with a market value of \$750,000
 - vacant land, buildings, residential and commercial property
 - mining, quarrying or prospecting rights where the material is situated in Australia
 - the grant of a lease over real property in Australia.

- other assets
 - indirect Australian real property interests in Australian entities whose majority of assets consist of the above-mentioned asset types
 - options or rights to acquire any of the above asset types.

Where any vendor disposes of Australian real property with a market value of \$750,000 or more, the purchaser will be required to withhold 12.5% of the [purchase price](#) and pay it to us – unless the vendor provides the purchaser with an ATO-issued clearance certificate to ensure the amounts are not withheld from their sale proceeds.

All property transactions with a market value of \$750,000 or more will need the vendor and purchaser to consider if they need a clearance certificate.

Vendors who are an Australian resident for tax purposes, but who have not obtained a clearance certificate before settlement, are taken to be foreign residents for the purposes of FRCGW. They will need to lodge an income tax return and claim a credit for the amount withheld. A credit for the amount withheld for foreign resident capital gains is applicable to the year the contract was signed. Therefore, it may take some time before the vendor can lodge the income tax return to declare the capital gain, be assessed and then given any applicable refund for the amount withheld

Purchase price

In many cases, the market value of a property will be the purchase price. Where the purchase price has been negotiated between the vendor and the purchaser, acting at arm's length, we will accept the purchase price as a proxy for market value.

When purchasers must withhold

The purchaser has an obligation to withhold when:

- any vendor of the asset is a relevant foreign resident
- the asset that the purchaser has acquired is a relevant asset
- the acquisition is not an excluded transaction
- the vendor does not provide a clearance certificate or make a relevant declaration.

Vendors

The obligation to withhold only arises if the vendor is a relevant foreign resident for the purposes of this measure.

The vendor is the entity that holds the legal title to the asset to which this withholding measure applies.

Where the asset is held on behalf of another entity, the vendor is the legal owner of the asset, for example, the trustee or custodian who holds the legal title on behalf of beneficiaries.

Unless an exception applies, the vendor is a relevant foreign resident if any of the following apply:

- The purchaser knows the vendor is a foreign resident.
- The purchaser reasonably believes the vendor is a foreign resident.
- The purchaser does not reasonably believe the vendor is an Australian resident, and either
 - has a record about the acquisition indicating that the vendor has an address outside Australia
 - is authorised by the vendor to provide a related financial benefit (for example, make a payment) to a place outside Australia (whether to the vendor or to anyone else).

- The vendor has a connection outside Australia of a kind specified in the regulations.
- The capital gains tax (CGT) asset to which the transaction relates is
 - taxable Australian real property
 - an indirect Australian real property interest, the holding of which causes a company title interest to arise.

Exceptions

A vendor is not a relevant foreign resident if they provide the purchaser with:

- a valid clearance certificate in transactions involving taxable Australian real property or indirect Australian real property company title interests (even if the vendor is actually an Australian resident for other income tax purposes)
- a valid vendor declaration in transactions involving other assets covered by the foreign resident capital gains withholding law.

Taxable Australian real property or indirect Australian real property company title interests

Where the capital gains tax (CGT) asset to which the transaction relates is taxable Australian real property or an indirect Australian real property company title interest, the entity is treated as a relevant foreign resident unless a clearance certificate is obtained from us certifying that the entity is not a relevant foreign resident for the purposes of this law.

This rule applies even if the vendor is actually an Australian resident for other income tax purposes.

Clearance certificates

We may issue a certificate (known as a clearance certificate) stating that the vendor of taxable Australian real property or an indirect Australian real property company title interest is not a relevant foreign resident. The clearance certificate will specify that withholding is not required on the acquisition of the property.

A clearance certificate is valid for 12 months from the date issued, so the vendor may be able to use it for multiple disposals of real property or indirect Australian real property company title interests that occur within that period. The vendor does not have to reapply for a clearance certificate each time they dispose of a property, as long as the clearance certificate is valid.


The clearance certificate may be provided to the purchaser at any time during the transaction but must be provided to the purchaser at or before settlement. To avoid unanticipated delays, and to ensure the certificate is valid at the time it is given to the purchaser, vendors seeking a clearance certificate should apply as early as practical in the sale process.


An application for a clearance certificate can be lodged prior to a contract for sale being entered into.

The purchaser can rely on the clearance certificate as proof that they are not required to withhold. Once the purchaser has received a copy of the clearance certificate they have met their obligation, even if the vendor's circumstances change during the settlement period.

Australian resident vendors who do not provide a clearance certificate to the purchaser at or before settlement will need to lodge an income tax return, for the applicable year the contract was signed, and claim a FRCGW credit for the withheld amount. It may take months before the vendor can lodge the income tax return to declare the capital gain and claim a credit for the amount withheld.

The amount withheld may be refunded in part or in full once the income tax return is processed (any tax refund calculated on the vendor's notice of assessment will be used to offset other tax debts, including debts on hold or debts with other government agencies before the refund is paid to the vendor). It will be refunded in full if there is no CGT payable on the sale of the property. For example, it was their main residence or there was a capital loss from its sale, and there are no tax debts payable.

To obtain a clearance certificate, a vendor who is an Australian resident (or their representative) must complete an online [Foreign resident capital gains withholding clearance certificate application](#)  form (NAT 74883).

[Conveyancers](#)  who are not legal practitioners or registered tax agents cannot complete the form on behalf of the vendor. They can

either provide the PDF version of the clearance certificate form (or URL hyperlink) to the vendor for them to complete. Conveyancers may either submit the completed PDF form to us via mail or enter the data into the online form (retaining a copy of the vendor-signed PDF form and keeping a printout of data entered into the online form).

Example: Resident entity treated as a foreign resident vendor

Louis purchases real estate in Melbourne from Lucas for \$3 million. This is taxable Australian real property. Louis believes that Lucas is an Australian resident.

Despite Louis's belief, unless Lucas provides Louis with a clearance certificate from us, Lucas is treated as a relevant foreign resident.

Louis must make a withholding payment to us.

Example: Clearance certificate process

Jennifer is acquiring an apartment in Sydney for \$2.6 million from a vendor whose legal representatives are based in Singapore. The vendor's Australian conveyancer has provided a clearance certificate obtained from us (for the vendor) to Jennifer.

The contract instructions advise that the funds should be transferred to a bank account overseas.

Jennifer and her representatives are certain they are acquiring the apartment from a foreign resident. Irrespective of this, the vendor has provided a valid clearance certificate to Jennifer. Jennifer is able to rely on this clearance certificate and does not have to withhold and pay any foreign resident capital gains withholding from the payment of \$2.6 million.

How long it will take to get a clearance certificate

We issue clearance certificates within 28 days of receiving the application.

Where the application requires further information from the applicant or has factors that may be considered higher risk or unusual, this will increase the time it takes to process. If the application is lodged close to the settlement date, we cannot guarantee we can process it by the settlement date as we will not disadvantage those other applicants who applied earlier by delaying their application to process yours.

Clearance certificates will be sent by email if an email address is provided in the application. Otherwise clearance certificates will be mailed to the vendor and the vendor's contact using the addresses provided in the application.

To avoid unanticipated delays, vendors seeking a clearance certificate should apply through the online system as early as practical in the sale process. This could be before offering the property for sale.

Individual vendors can obtain a copy of their clearance certificate outcome online:

1. login to myGov and go to ATO online services
2. under the My profile menu, go to Communication
3. go to History.

Clearance certificate validity

A clearance certificate is valid for 12 months from the date of issue. It is only valid for the listed vendor and the period noted on it.

Vendors must ensure that the details on their clearance certificate application are accurate, so the clearance certificate issues in the correct name.

It is the vendor's responsibility to provide the purchaser with the clearance certificate and ensure it is valid.

For the purchaser to rely on the clearance certificate, the:

- name of the vendor on the certificate must match the name on the certificate of title (unless proof of name change is provided) – the clearance certificate issues in the legal name that we have on our systems. Before applying ensure the vendor's name is correct on our systems and **update your name** if required
- date the certificate is given to the purchaser must be a date that falls within the clearance certificate period and must be provided before settlement.

When a purchaser receives a clearance certificate from a vendor and sees that it is valid, they can rely on it and not withhold. There is no need for the purchaser to question the residency of the vendor.

However, if the clearance certificate does not meet these conditions, the purchaser is required to withhold 12.5% of the purchase price.

Although not a requirement, purchasers may check the validity of clearance certificates with us prior to deciding whether to withhold the 12.5% amount from the purchase price. Phone us on **13 28 66** (fast key codes **4 2**) to confirm the validity of the clearance certificate by providing:

- the number from the 'Our reference' field at the top of the certificate
- the vendor's name as it appears on the clearance certificate.

Where there are multiple vendors

A clearance certificate only applies to the entity specified on the certificate. If an asset has multiple vendors, each vendor will need to supply the purchaser with a clearance certificate to ensure amounts are not withheld.

The rules apply if the market value of the asset acquired is exactly \$750,000

The transaction will only be excluded from the rules if the market value of the taxable Australian real property or company title interest acquired is **less** than \$750,000.

If the market value is unknown

If the vendor is uncertain whether the \$750,000 threshold will be reached, for example because the property is going to auction or a sales contract is yet to be signed, they can be conservative and apply for a clearance certificate. If the property is then sold for less than \$750,000, the vendor does not need to provide the purchaser with the clearance certificate.

Disbursements and other costs as part of the market value of the asset

We recognise that disposals of real property may involve the payment of disbursements as part of the contract.

If the adjustment changes the consideration paid for the asset, then the calculation of the amount to be withheld should be based on the final adjusted purchase price.

Where the purchase price is used as a proxy for market value, the market value is the purchase price before adjustment for any disbursements at settlement (for example, for council rates, water and sewer charges and strata levies). Therefore, the \$750,000 threshold test is applied to the purchase price before adjustment for disbursements.

Other assets

For other assets, the purchaser's decision about whether the vendor is a relevant foreign resident depends on whether the purchaser either:

- has received one of two declarations which they do not know to be false, either
 - a residency declaration
 - a declaration that the membership interest is not an indirect Australian real property interest

- knows, or has reasonable grounds to believe, the vendor is a foreign resident (referred to as the knowledge condition).

A vendor may make a standing declaration which remains valid for six months after the day the declaration is made.

The purchaser can rely on the declaration unless they know it to be false.

Residency declarations

The vendor will not be a relevant foreign resident where they have provided a declaration to the purchaser that they are an Australian resident (unless the purchaser knows it to be false).

A declaration is only effective in relation to the specific vendor. If an asset is acquired from multiple vendors, a purchaser requires a declaration from each vendor or they must withhold.

A declaration as to residency can be relied upon for:

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

A purchaser can rely on a declaration, even if a purchaser has reasonable grounds to doubt its accuracy.

However, if the purchaser knows the declaration is false, the declaration has no effect on the obligation to withhold. A purchaser will only know a declaration to be false if they have specific knowledge of the fact. That is, the purchaser must be a party to the fraud committed by the vendor or must have knowledge that the declaration is completely implausible.

In all other circumstances, the declaration can be relied on.

Declarations that the membership interest is not an indirect Australian real property interest

A vendor can make a declaration that the CGT asset is a membership interest, but not an indirect Australian real property interest, because the membership interest does not satisfy either the:

- non-portfolio interest test
- principal asset test.

Membership interests that are not indirect Australian real property interests are not within the scope of the law.

The vendor is likely to be in a better position than the purchaser to determine whether the membership interests satisfy the tests for an indirect Australian real property interest.

To support this, the obligation to withhold does not apply where the purchaser relies on a declaration by the vendor that the interests are not indirect Australian real property interests. A purchaser may rely on the declaration even though the declaration may be inaccurate, unless the purchaser has specific knowledge that the declaration is false.

If the vendor does not supply a declaration when requested

If the vendor does not supply a declaration when requested, the purchaser should withhold 12.5% from the purchase price at settlement.

When a declaration from a vendor is valid

A vendor's declaration is valid for six months from the date it is signed by the vendor. It is only valid for the listed vendor and specified period on the declaration.

It is the vendor's responsibility to provide the purchaser with a declaration and ensure it is valid at the time it's provided.

The purchaser can rely on the declaration if the:

- name of the vendor on the declaration matches the name of the owner of the asset
- date the vendor provides the declaration to the purchaser is a date that falls within the specified period on the declaration and is provided before settlement.

When a purchaser receives a valid declaration from a vendor they can rely on it and not withhold.

If the declaration does not meet these conditions, the purchaser must withhold 12.5% of the purchase price.

There is no declaration form

However a template that can be used is available for download from our website at ato.gov.au/FRCGW.

If there are multiple vendors

A declaration is only valid for the vendor specified in the declaration. If an asset is acquired from multiple vendors, each vendor would need to provide the purchaser with their own declaration to ensure that the withholding obligation does not apply to each of them.

Declarations and the disposal of real property

A vendor cannot use a declaration to avoid having the purchaser withhold the 12.5% withholding in relation to the disposal of real

property.

Penalties for false declarations

A vendor who makes a declaration that is false or misleading will have a penalty imposed upon them by us. The amount of the penalty varies depending on the severity of the offence.

The knowledge condition

The purchaser only has to consider the knowledge condition if the vendor has not supplied a vendor declaration.

The knowledge condition is satisfied where the purchaser:

- has specific knowledge that the vendor is a foreign resident – for example, the purchaser will have specific knowledge if the vendor discloses that they are a foreign resident for income tax purposes
- reasonably believes that the vendor is a foreign resident – for example, the purchaser may have a reasonable belief if they learn the vendor is likely to be living overseas
- has no reasonable grounds to believe the vendor is an Australian resident, and the amount is to be paid outside Australia, or the vendor has a foreign address.

Where there are reasonable grounds to believe the vendor is an Australian resident, withholding will not be required, even if an amount is paid outside Australia, or the vendor has an address outside Australia.

Reasonable grounds to believe the vendor is (or is not) an Australian resident must be considered on an objective basis. The question is whether a reasonable person in the position of the purchaser would have thought there were reasonable grounds to support this belief.

If the purchaser does not know or have reason to believe the vendor is a foreign resident, the knowledge condition ensures that the obligation to pay an amount to us does not arise. This provides certainty to purchasers.

Purchasers who are not comfortable applying the knowledge condition can ask the vendor to supply a vendor declaration. If the vendor does not supply a valid vendor declaration then the purchaser can assume the vendor is a relevant foreign resident and that they must withhold.

Example: Declaration used to determine residency

Andrew enters into an off-market transaction to acquire all the shares in a company. The majority of the company's investments are in real property holdings throughout Australia. The shares, therefore, constitute indirect Australian real property interests.

Andrew does not know the vendor of the shares. Under the terms of the sale contract, Andrew is to transfer the purchase price of the shares to an overseas bank account in the name of an associate of the vendor.

At this stage, the knowledge condition is satisfied. Andrew notifies the vendor that he intends to withhold a portion of the purchase price unless the vendor can provide Andrew with a declaration.

The vendor provides Andrew with a declaration stating the vendor is an Australian resident for income tax purposes, which Andrew does not know to be false. The knowledge condition is no longer relevant because Andrew has a declaration that the vendor is an Australian resident, that he is entitled to rely on.

Even if Andrew could not verify the declaration to the extent necessary for him to have a reasonable belief in its accuracy, he could rely on it and no withholding and payment obligation would arise.

Example: Vendor declaration that they are a resident

Zack and Belinda enter into an off-market transaction to acquire all of the shares in a company from a friend of their family. The majority of the company's investments are in real property holdings throughout Australia. The shares, therefore, constitute indirect Australian real property interests.

The friend has not provided a declaration to Zack or Belinda stating that the shares are not an indirect Australian real property

interest, or that the friend is an Australian resident.

In deciding if they need to withhold from the payment, Zack and Belinda consider their relationship with the vendor. They have known the family friend for many years, and have no reason to think the family friend has an address outside Australia. They also take into account the fact that the funds were to be paid into an Australian bank account.

Consequently, Zack and Belinda are satisfied they have met the knowledge condition, as they reasonably believe the family friend to be a resident. Hence, they do not withhold.

Assets

The law applies to the following assets:

- taxable Australian real property
- an indirect Australian real property interest
- an option or right to acquire such property or such an interest.

The law only applies to these assets. Transactions involving other assets that are taxable Australian property are not subject to withholding, for example, an asset used in running a business through an Australian permanent establishment is excluded.

Example: Relevant assets

Foreign resident Hank owns a range of assets in Australia which he has decided to dispose of to fund an investment in the USA.

The assets are:

- a residential block of apartments in Melbourne
- a portfolio of shares in an ASX200 listed index fund
- the inventory from a manufacturing business in Sydney
- a mining tenement allowing exploration within North Queensland
- a lease on agricultural land in the Murray River Basin
- an option to acquire shares in a carpet cleaning business.

The residential block of apartments is a relevant asset. It is taxable Australian real property, being land or buildings situated within Australia.

The portfolio of shares in an ASX listed fund is not a relevant asset. The law excludes transactions made on an approved stock exchange.

The inventory is not a relevant asset. Inventory is not taxable Australian real property and not an indirect Australian real property interest.

The mining tenement is a relevant asset. It is taxable Australian real property, the definition of which includes 'a mining, quarrying or prospecting right'.

The lease on agricultural land is a relevant asset. A lease of land is specifically included within the definition of taxable Australian real property.

The option is not a relevant asset. The asset that the option relates to is not taxable Australian real property or an indirect Australian real property interest.

Taxable Australian real property

A CGT asset will be taxable Australian real property if it is:

- real property situated in Australia (including a lease of land, if the land is in Australia)
- a mining, quarrying or prospecting right (to the extent that the right is not real property) if the minerals, petroleum or quarrying materials are in Australia.

For the purposes of this measure, real property includes vacant land, buildings, residential and commercial property, and indirect Australian real property interests, the holding of which causes a company title interest to arise.

Indirect Australian real property interest

For a membership interest in an entity to be an indirect Australian real property interest at a particular time, the membership interest must satisfy two tests, being both:

- the non-portfolio interest test
- the principal asset test.

Membership interest includes shares in a company.

The non-portfolio interest test

An interest held by an entity (the holding entity) in another entity (the test entity) is a non-portfolio interest if the sum of the membership interests held by the holding entity (and their associates) in the test entity is 10% or more.

The test is satisfied if the membership interest is a non-portfolio interest at the time of the transaction, or through a 12-month period in the last 24 months leading up to the transaction.

The principal asset test

The principal asset test is used to determine if 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 value of the entity's assets that are taxable Australian real property exceed the sum of the market value of the assets that are not.

Example: Applying the non-portfolio interest and principal asset tests

Foreign resident Kimiko has held a 15% interest in an Australian mining company from an initial purchase offer in 2011. With the downturn in commodity prices she has sold 8% of that interest.

Will this sale be subject to the withholding regime? A valuation of the mining company's assets was undertaken at the time of the sale. It provides that the market values of the assets are:

- mining rights \$1.7 million
- plant and equipment \$4.1 million
- mining information \$2.8 million
- land \$5 million.

Non-portfolio interest test

At the time Kimiko disposed of her interest in the mining company, she held a 15% interest. This satisfies the requirement that the interest be 10% or above.

That she has only disposed of 8% of its interest in the mining company has no bearing on the non-portfolio test. It is the interest held at the time of the disposal that is the key factor. As long as that is at least 10%, any disposal of that interest can be subject to the withholding.

Principal asset test

The assets of the mining company that are taxable Australian real property are the land and the mining rights. The mining information and plant and equipment (assumed for this example) 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 \$6.7 million and of the other assets \$6.9 million.

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

Consequently, the 8% interest that Kimiko 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.

Options and rights to acquire certain assets

An option or right to acquire property is a CGT asset of the holder of the right. Where an option or a right is granted by a foreign resident over taxable Australian real property or an indirect Australian real property interest, the granting of the option or right will be subject to withholding.

Where the purchaser subsequently acquires the asset from the foreign resident as a result of exercising the option, the amount to which the 12.5% withholding applies is the amount paid for the asset, disregarding any amount the purchaser paid for the option, including

the market value of any property they gave for the option (or to renew or extend the option).

Example: Exercise of an option

Australian company Oz Co acquires an option from a foreign resident entity, giving it the right to purchase a commercial property for \$62 million within 18 months of taking the option.

Oz Co then pays \$4 million, withholds \$500,000 and pays this to us.

14 months after the option purchase date, commercial property prices increase to such an extent that Oz Co decides to exercise the option and acquire the property for \$62 million.

All the conditions are met for the foreign resident capital gains withholding to occur. The law ensures that Oz Co only withholds from \$58 million, being the \$62 million contract price less the \$4 million paid for the option. Oz Co withholds and pays \$7.25 million to us.

Excluded transactions

The law excludes certain transactions from the obligation to withhold. The vendor will need to determine their income tax or capital gains tax obligations when completing their income tax return.

Taxable Australian real property valued at under \$750,000

The law excludes transactions involving taxable Australian real property with a market value of less than \$750,000. The exclusion applies for all taxable Australian real property, including:

- residential premises
- commercial property
- vacant land
- leasehold
- easements

- covenants
- mortgages
- stratum title schemes.

In most cases, the market value of a property will be the purchase price. Where the purchase price has been negotiated between the vendor and the purchaser, acting at arm's length, we will accept the purchase price as a proxy for market value.

Example: The \$750,000 threshold

Foreign resident Juan sells his bayside mansion. The contract is signed on 2 July 2017 for a sale price of \$690,000. Juan and the purchaser were unknown to each other, and the transaction occurred through their legal and conveyancing representatives.

In many cases a purchase price negotiated between a purchaser and vendor, acting at arm's length, would be the same as the market value and it would not be necessary for the purchaser to seek a separate expert valuation. In these cases the purchase price may be used as a proxy for market value.

As a result, no withholding is required in this instance.

Example: How the \$750,000 threshold applies with multiple purchasers

Four residents purchase a small apartment complex for \$2.8 million from a foreign resident with whom they have no existing relationship. The respective purchaser interests are 45%, 25%, 18% and 12%.

Is withholding to be imposed?

If the withholding obligation is considered for each purchaser in isolation to the others, it would be shown that purchaser one is paying \$1.26 million for their share of the apartment complex. Each of the other three purchasers is paying less than \$750,000 for their respective interests.

The measure requires the market value of all purchasers to be aggregated in examining whether the \$750,000 market value threshold has been reached.

As the aggregated purchase price (market value) from all the purchasers is \$2.8 million, each purchaser must withhold an amount in proportion to their percentage of the total purchase price.

In total \$350,000 must be withheld and paid to us.

Company title interests valued at under \$750,000

The law excludes transactions involving membership interests that cause a company title interest to arise where those membership interests have a market value of less than \$750,000.

This aligns the treatment for entities that own property through company title with the treatment for those that own property through strata title.

Other indirect real property interests do not fall within this exclusion.

Transactions on an approved stock exchange

The law excludes transactions made on an approved stock exchange.

The nature of these transactions makes it impossible for a purchaser to determine the identity and residency status of the vendor.

Example: Sales on an approved stock exchange

Foreign resident Xing Xi owns shares in two Australian entities. His interests meet the requirements to be indirect Australian real property interests. One interest is listed on Chi-X Australia and the other is listed on the Australian Securities Exchange (ASX).

Chi-X Australia and the ASX are approved stock exchanges. Therefore the transactions are not considered for the purposes of this withholding measure.

Transactions on a crossing system

The law excludes from withholding any transactions conducted using a crossing system.

A crossing system (also known as a 'dark pool') is a system that enables trading off-market, although the trades are typically reported to the market immediately after they take place.

As with transactions that occur on an approved stock exchange, it may not be possible for a purchaser to determine the identity and residency status of the vendor.

Securities lending arrangements

A 'securities lending arrangement' is an arrangement where a holder of securities agrees to provide its securities to a borrower for a specified period of time, with an associated agreement by the borrower to return equivalent securities at the end of the agreed period. These arrangements are typically entered into for purposes such as short-selling or hedging.

The law excludes such transactions.

External administration and bankruptcy

The law excludes transactions where the vendor is in external administration or transactions arising from the administration of a bankrupt estate, a composition or scheme of arrangement, a debt agreement, a personal insolvency agreement, or same or similar circumstances under a foreign law.

Varying the amount to be withheld

The amount to be withheld can be varied by us or at the initiative of a party with an interest in a transaction, including a creditor. This supports the principle whereby we must take a creditor's rights into account.

Vendors can apply for a variation where all of the following apply:

- they are not entitled to a clearance certificate
- a vendor's declaration is not appropriate
- there is a reason as to why 12.5% withholding is too high taking into account the actual Australian tax liability on the sale of the asset.

Reasons for a variation could include instances where:

- the foreign resident will not make a capital gain on the transaction (for example, because they will make a capital loss or a CGT rollover applies)
- the foreign resident will otherwise not have an income tax liability (for example, because of carried-forward capital losses or tax losses)
- there are multiple vendors, only one of whom is a foreign resident
- a creditor of the vendor has a mortgage or other security interest over the property and the proceeds of sale available at settlement are insufficient to cover both the amount to be withheld and to discharge the debt the property secures.

If a vendor doesn't provide a variation at or before settlement, the purchaser must withhold 12.5% of the purchase price for transactions above \$750,000. The FRCGW amount has not been withheld in error, either in part or in full, where the vendor is entitled to a variation and didn't obtain one before settlement.

The vendor will need to lodge a tax return, claim a credit for the withheld amount and declare their capital gain (declaring an amount of '0' if there is no capital gain or was a capital loss). A credit for the amount withheld for foreign resident capital gains is applicable to the year the contract was signed. Therefore, it may take some time before the vendor can lodge the income tax return to declare the capital gain and claim any available credit for the amount withheld. Any excess amount withheld may be refunded after the tax return is assessed.

Foreign residents for tax purposes who held property on 9 May 2017 were able to claim the CGT main residence exemption where the CGT event (disposal) of the property occurred on or before 30 June 2020.

Example: Vendor applies for variation

Foreign resident Victor is selling a commercial property located in Australia with a cost base of \$3 million.

Victor does not expect to be able to sell the property for \$3 million or more (that is, he expects to make a capital loss on the sale).

Victor applies to us for a variation.

We issue a variation notice to Victor under which the amount to be withheld is reduced to nil.

The variation is subject to the condition that the purchase price for the property does not exceed \$3 million.

Paul then agrees to purchase the property from Victor for \$2.9 million. Victor provides a copy of the variation notice to Paul. The variation takes effect and Paul does not withhold any amount.

Example: Variation to meet a secured creditor obligation

Foreign resident Daniel owns a commercial property located in Australia. He owes \$2.9 million to a bank, secured by a mortgage over the property. Daniel and the bank are not related parties. Daniel has met all his loan obligations and there is nothing to suggest he will not continue to do this.

Daniel enters into a contract to sell the property for \$3 million. The purchaser knows Daniel is a foreign resident, and that they would normally be required to withhold \$375,000 and pay that amount to us.

If they do so, Daniel won't have sufficient sale proceeds to discharge the mortgage. Daniel is entitled to apply for a variation. We would work with Daniel and the bank to achieve a sensible outcome.

Example: Creditor applying for a variation

Foreign resident Chris owns a commercial property located in Australia. He owes \$3 million to a bank, secured by a mortgage over the property.

Chris's business has been performing poorly and he has missed a number of loan repayments. The bank decides to take

possession of the property and exercise its power of sale.

The property is sold for \$2.9 million net of costs. The proceeds are insufficient to withhold the 12.5% to be paid to us and to discharge Chris's mortgage.

Chris prefers us to be paid rather than the bank, because he would be entitled to a credit for this amount withheld. Therefore, he does not apply for a variation (even though one may be available if he made a capital loss).

The bank is entitled to apply for a variation and does so.

We consider the circumstances and conclude that requiring an amount to be withheld and paid to us would prevent the bank from recovering the debt from its secured interest.

We issue a notice to the bank varying the amount to be withheld to nil.

The bank provides a copy of the notice to the purchaser. The purchaser is relieved of any obligation to withhold and pay an amount to us.

How to apply for a variation

To apply for a variation, the vendor or vendor's creditor needs to complete the online Foreign resident capital gains withholding rate variation application form. To access the form, visit ato.gov.au/FRCGW.

If the vendor hasn't lodged a variation certificate online, conveyancers (who are not legal practitioners or registered tax agents) cannot complete the form on behalf of the vendor. They can provide either the PDF version of the variation form (or hyperlink) to the vendor for completion. Conveyancers may submit the completed PDF form to us via mail or fax, or enter the data into the online form (retaining a copy of the vendor-signed PDF form and keeping a printout of data entered into the online form).

Time it takes to obtain a variation notice

In the majority of cases (where we have received all the required information) a variation notice will be issued within 28 days.

Variation notices will be sent by email if an email address is provided in the application. Otherwise notices will be mailed to the vendor and the applicant using the addresses provided in the application. The variation notice should be shown to the purchaser before settlement to ensure the reduced withholding rate applies.

Calculating the reduced rate of withholding

Vendors need to calculate their reduced rate of withholding. This could be a rate between nil and 12.49%, for example, if you made no capital gain put in 0%.

Any varied rate approved by us will depend on the information provided by the vendor in their application.

Variation notices and multiple vendors

A variation notice applies to the specified vendor and applicable asset on the notice. If an asset is acquired from multiple vendors, each vendor will need to supply the purchasers with separate variation notices if a reduced rate of withholding is to apply to each vendor.

Variation notice validity

A variation notice is valid for 12 months from the date of issue for the listed vendor and applicable asset on the notice.

Vendors must ensure the details on their application are accurate so the variation notice issues with the correct vendor and applicable asset details.

It is the vendor's responsibility to provide the purchaser with the variation notice and ensure it is valid at the time of settlement.

For the purchaser to rely on the variation notice the:

- name of the vendor and applicable asset details on the notice must match those on the certificate of title or other asset ownership documentation
- settlement date must be on or before the expiry date on the variation notice.

When a purchaser receives a valid variation notice from a vendor they can rely on it and not withhold.

If the variation notice does not meet the above-mentioned conditions, the purchaser is required to withhold 12.5% of the purchase price.

A purchaser can check the validity of a variation notice with us prior to deciding whether to withhold the 12.5% amount from the purchase price. Phone us on **13 28 66** (fast key codes **4 2**) to confirm the validity of the variation notice, by providing the:

- number from the 'Our reference' field at the top of the notice
- vendor's name, varied rate and applicable asset details as they appear on the notice.

Calculating the amount to withhold

Where a purchaser has determined they have an obligation to withhold, they must withhold 12.5% (or a varied rate as per a valid variation certificate) from the 'first element of the cost base' of the asset.

The first element of the cost base is an existing tax concept which is the amount of money paid (or required to be paid) or the market value of any property given (or required to be given) to acquire the asset.

However, as purchase price is understood by vendors and purchasers, and in many instances will be equal to the first element of the cost base, where the transaction is at arms-length, the purchase price may be used in determining how much withholding is required.

We recognise that some assets subject to this withholding measure may involve the payment of disbursements as part of the contract. Where the purchase price is used as a proxy for market value, the market value is the purchase price before adjustment for any disbursements at settlement (for example, for council rates, water and sewer charges and strata levies). Therefore, the \$750,000 threshold test for taxable Australian real property is applied to the purchase price before adjustment for disbursements.

Example: How much to withhold and pay

Claudia is buying a house where the contract price is \$3.3 million. She has been advised by the vendor's representative that the vendor is a foreign resident.

Depending upon the particulars of the contract, the \$3.3 million may be comprised of the purchase price for the property, plus a number of other costs associated with the property that Claudia has agreed with the vendor to pay for.

In this case Claudia advises that they are withholding based upon the contracted purchase price of the property. Therefore the first element of the cost base is assumed to be the same as the purchase price; this means the purchase price is used to determine the amount to be withheld.

Claudia therefore withholds \$412,500 (12.5% of \$3.3 million).

Multiple purchasers

Where there are multiple purchasers, each purchaser does not look at their percentage interest in isolation to the other purchasers in determining whether they should withhold. Each purchaser must withhold in proportion to their percentage of the total purchase price.

Where the asset being disposed of is taxable Australian real property, the market value of all purchasers' interests must be aggregated in examining whether the \$750,000 market value threshold has been reached. If the aggregated purchase price is \$750,000 or more, each purchaser must withhold in proportion to their percentage of the total purchase price.

Example: Multiple purchasers

You are purchasing a commercial property jointly with another entity. Your share of the acquisition is 40%, for which you are paying \$675,000. This means the total property purchase price would be \$1.5 million.

Even though your purchaser's interest is below the \$750,000 threshold, the property as a whole exceeds the \$750,000 threshold – so you will need to withhold \$84,375.

Multiple vendors

If multiple vendors are disposing of an asset, the total market value of the asset determines whether withholding is required by the

purchaser.

If the purchaser has not been provided with a clearance certificate, vendor declaration or a variation from any of the vendors, the purchaser must withhold 12.5% of the purchase price. The amount of withholding will be in proportion to each vendor's interest in the asset.

Where one (but not all) of the vendors provides a clearance certificate or vendor declaration to the purchaser, the withholding obligation still applies as there is still a foreign resident vendor to the transaction. The amount of withholding is still on the entire first element of the cost base of the asset, not just the portion that is attributable to the relevant foreign resident vendor's interest in the asset.

We recognise that in this situation, any vendors that are subject to the withholding would apply for a variation to ensure that the withholding amount better reflected the foreign resident vendor's tax liability. They would receive a reduction in the withholding rate accordingly.

To reduce the need for vendors to apply for variations in these situations, our approach is that where there are multiple vendors, the purchaser may withhold in accordance with each vendor's proportional interest in the purchase price, subject to any clearance certificate, vendor declaration or vendor variation being provided prior to settlement.

The following situations are from the perspective of a purchaser who is deciding what to do in terms of withholding. In all instances it is assumed the purchase price is \$750,000 or more.

Example: Joint owners but only one vendor is an Australian resident

The purchaser has to withhold as a vendor is deemed to be a foreign resident. The purchaser would need to see a clearance certificate from the Australian resident vendor. If the clearance certificate is not provided by settlement then the purchaser has to withhold an amount from both vendors.

However, if a clearance certificate is provided before settlement by the Australian resident, the purchaser only has to withhold from the foreign resident vendor. The withholding would normally be on the full purchase price of the property – but we are

allowing the withholding amount to be calculated on the foreign resident's interest in the purchase price only.

Example: Foreign resident vendor provides a variation

The circumstances are identical but now the foreign resident vendor provides the purchaser with a variation notice and the Australian vendor provides a clearance certificate. The purchaser does not have to withhold an amount from the Australian resident. The purchaser has to withhold from the foreign vendor, but the rate of withholding is not 12.5% but the withholding rate is as specified on the variation notice issued by us to the foreign resident vendor.

Example: Multiple foreign resident vendors

As the property is being sold by foreign residents the purchaser knows they must withhold. The purchaser has not received a clearance certificate, and therefore must assume all the vendors are foreign residents.

Absent any variation notices, the purchaser must withhold from each foreign resident vendor an amount based on their proportionate interest in the property – that is, 12.5% of their share of the purchase price. The sum of the withholding amounts should equal 12.5% of the full purchase price.

However, if some or all of the foreign resident vendors provide the purchaser with a variation notice, the purchaser must apply the specified withholding rate to that vendor's share of the purchase price. For example, it may be that the purchaser has to withhold 8% from one vendor, and 3% from another vendor.

The purchaser will need to ensure that the correct amount is withheld from each vendor.

Multiple properties in one transaction

A vendor may be disposing of multiple properties in one transaction, the combined value of which exceeds \$750,000. The withholding is based on the market value of a property being disposed of – not a combination of all the properties being disposed of.

The withholding is not an additional payment on top of the agreed purchaser price

The obligation for the purchaser to withhold an amount and pay it to us is not an additional payment on top of the agreed purchase price. The withholding amount is taken from the amount of purchase price that the purchaser has agreed to pay the vendor.

A purchaser that withholds in accordance with their Australian income tax obligations is protected by sub-section 16-20(2) of Schedule 1 of the *Taxation Administration Act 1953*. This discharges the purchaser from their liability to pay this part of the total purchase price directly to the vendor.

When withholding is required

Withholding is not required from deposits paid on signing of the contract. No payment is required when the purchaser signs the contract and pays the deposit. The purchaser is not required to pay the Commissioner until the day the purchaser becomes the owner of the asset, that is, on settlement.

If payments are to be made in multiple instalments across the contract period, withholding should only occur when the final payment is made at settlement. The withholding amount is still calculated using the full purchase price of the asset.

If the contract doesn't settle

If for some reason the contract is not completed (settled), there is no obligation on the purchaser to withhold. This is because the purchaser has not become the owner of the asset, and therefore there is no obligation to pay an amount to us.

If the purchaser fails to withhold

If the purchaser fails to withhold when they should, a penalty may be imposed by the Commissioner which is equal to the amount that was

required to be withheld and paid. General interest charges will also be applied.

Goods and services tax

Market value

The \$750,000 threshold for real property is based upon the 'market value' of that property. Market value can be affected by the income tax law which provides that the market value of an asset at a particular time (in this case just after the transaction) is reduced by the amount of any input tax credit the purchaser is entitled to, assuming that both:

- the asset had been acquired at the relevant time
- the acquisition had been solely for a creditable purpose.

Consequently, on the basis that the parties are acting at arm's length:

- Where a purchaser is not registered for goods and services tax (GST), or the supply of the asset is not a taxable supply, or the purchaser is not able to claim an input tax credit on the purchase, the GST-inclusive purchase price payable by the purchaser may be used as a proxy for the market value of the asset.
- Where the purchaser is registered for GST and the transaction is a taxable supply, and the purchaser is able to claim an input tax credit on the purchase, the GST-inclusive purchase price less the input tax credit may be used as a proxy for the market value of the asset.

The sale of existing residential premises (but not commercial residential premises or new residential premises) is input taxed and therefore not a taxable supply. Where the asset is shares (for example company title interests), the supply of shares is input taxed and therefore not a taxable supply.

If the margin scheme is used, a purchaser cannot claim input tax credits on that acquisition, even if they are registered for GST and intend to use the purchased property for a creditable purpose. In these instances, a GST-registered purchaser should calculate the 12.5% withholding by using the GST-inclusive price.

Example: Determining market value when GST is involved

Edwina is a successful entrepreneur in the manufacturing industry. She acquires a vacant Sydney commercial property for \$5.3 million to expand her business. She knows the vendor is a foreign resident, because she had not received a clearance certificate at settlement.

What is the market value for determining the withholding amount?

Edwina is registered for GST as her manufacturing business generates turnover that requires this.

GST has been included in the contract to buy the commercial property, and equals 1/11th of the total purchase price of \$5.3 million that Edwina paid. She holds a valid tax invoice for the purchase.

The commercial property is to be used for expanding Edwina's manufacturing business, so it will be used for a creditable purpose. That is, used by Edwina in her enterprise of making taxable supplies of manufactured goods.

Consequently, the market value upon which Edwina will withhold is \$5.3 million minus the GST that has formed part of the purchase price.

For a fully taxable supply, $GST = 1/11$ th of the purchase price, so the market value will equal $10/11$ ths of \$5.3 million – or approximately \$4.82 million.

GST and the first element of the cost base

The 12.5% withholding rate is to be applied against the 'first element of the cost base' of the asset that the purchaser is acquiring.

However, as purchase price is understood by vendors and purchasers, and in many instances will be equal to the first element of the cost base, where the transaction is at arm's length the purchase price may be used to determine how much to withhold.

The actual purchase price may depend upon whether or not a purchaser is registered (or is required to be registered) for GST. The following should be taken into account:

- Where the purchaser is registered for GST and the transaction is a taxable supply, and the purchaser is able to claim an input tax credit on the purchase, the first element of the cost base can be reduced by the amount of any GST net input tax credits (that is, GST the purchaser can claim back) included in the cost.
- Where a purchaser is not registered for GST or the supply of the asset is not a taxable supply, or the purchaser is not able to claim an input tax credit on the purchase, the purchaser does not make any adjustment; the GST is included in the first element of the cost base.

The sale of existing residential premises (but not commercial residential premises or new residential premises) is input taxed and therefore not a taxable supply. Where the asset is shares (for example, company title interests), the supply of shares is input taxed and therefore not a taxable supply.

If the margin scheme is used, you cannot claim input tax credits on that acquisition, even if you are registered for GST and intend to use the purchased property for a creditable purpose. GST-registered purchasers should calculate the 12.5% withholding by using the GST-inclusive price in the first element of the cost base.

Example: Determining the cost base when GST is involved

Xavier is registered for GST and is acquiring a retail building that is already tenanted. The vendor did not agree in writing to supply the building as a GST-free going concern, so the supply is fully taxable. The GST-inclusive price as per the contract is \$3.7 million.

Xavier knows from paying for financial advice from a reputable accounting firm that he will be entitled to claim back input tax credits from this transaction as long as he holds a valid tax invoice for the purchase.

At settlement no clearance certificate has been provided by the vendor.

Xavier knows he has to withhold but is concerned as to what amount it should be based on, as the financial advice he received is quiet on this matter.

Xavier has confirmation he can claim input tax credits reflecting the GST he has paid as part of the contract to acquire the building.

Given the vendor has failed to present a clearance certificate, Xavier knows he must potentially withhold, depending upon what the 'first element of the cost base' of the retail building is.

There is nothing to suggest this transaction is not an arm's length arrangement, so the purchase price can be used as a proxy for the 'first element of the cost base'.

Xavier is registered for GST and at settlement obtained a valid tax invoice for the transaction showing the purchase price and the GST amount included in that price.

To work out the market value, Xavier deducts the GST he is entitled to claim back as an input tax credit. The tax invoice indicates the input tax credits total \$336,363 (that is, 1/11th of \$3.7 million).

Consequently, the 12.5% withholding is to be applied to \$3.7 million less \$336,363 = \$3,363,637.

Paying the ATO

The purchaser must pay the required amount to us on or before the day they become the owner of the property.

No withholding and payment obligation arises if the contract falls through and change in ownership does not occur.

In recognition of the practicalities of making payment at settlement, we will allow a short period after settlement to receive payment before imposing general interest charges and initiating recovery action.

Example: When to pay

Ben acquired a residential property for \$3 million. If the vendor does not provide Ben with a clearance certificate by settlement, Ben knows the vendor of the property will be classed as a foreign resident and that he has a withholding obligation.

Ben entered into the contract for the purchase of the property on 1 July 2017 and paid a \$150,000 deposit.

The contract was settled on 1 October 2017 when Ben was required to pay the balance of \$2.85 million to the vendor in return for receiving legal title to the property. Ben will withhold \$375,000 from the settlement amount (paying \$2.475 million to the vendor).

Ben is required to pay the \$375,000 to us on or before the day he receives legal title to the property – 1 October 2017.

How to pay

The purchaser can pay using any of the following methods:

- Electronic funds transfer – transfer the amount via EFT to
 - Bank: Reserve Bank of Australia
BSB: **093 003**
Account number: **316 385**
Account name: ATO direct credit account
Reference: Your payment reference number.

- In person at any Australia Post outlet
 - The purchaser will need the payment slip and barcode supplied to them after lodging the *Foreign resident capital gains withholding purchaser payment notification*. Australia Post accepts cheques up to \$100 million.

- Mail a cheque with your payment reference number (the payment slip is helpful but not compulsory) to us at
 - **Australian Taxation Office**
Locked Bag 1936
ALBURY NSW 1936
AUSTRALIA.

Notifying us about payment

When an amount is withheld, all purchasers involved in the sale must complete a *Foreign resident capital gains withholding purchaser payment notification form* (NAT 74884). Where there are multiple purchasers one form can be used if there are 10 or fewer purchasers or purchasers can lodge a form individually. The purchaser (or purchasers) needs to provide the details of the vendors and the asset in their application.

To access the form and instructions, visit ato.gov.au/FRCGW.

Once a payment notification form is processed, a payment reference number (PRN) will be issued, along with a PDF icon that can be clicked on to obtain a downloadable payment slip and barcode to use at Australia Post.

Only one PRN is issued per purchaser payment notification form, even if multiple purchasers are supplied on the form.

The full payment can be made using the PRN or payment slip provided. Where two or more purchasers are included in the transaction, they can choose to make separate payments and use the same PRN or payment slip.

The payment notification form may allow the purchaser to quote the vendor's tax file number (TFN) if the vendor has provided one. Under the law, purchasers may collect TFNs from foreign residents (where they have them) and provide them to us. This will assist us with matching withholding payments to specific foreign residents.

We encourage you to submit your payment notification form to us as early as possible to ensure you have your PRN at settlement.

What happens after payment has been made

A receipt from either Australia Post or us is proof that the purchaser has made the payment and fulfilled their obligations.

A payment confirmation email or letter will be sent to the nominated contact on the purchaser payment notification form. Confirmation will be sent by email if an email address is provided in the Foreign resident capital gains withholding purchaser payment notification form. Otherwise it will be mailed to the address of the contact.

Vendors will need a copy of the payment confirmation and use this information to claim a credit for the withholding amount when completing their income tax return.

Leases

A lease is a CGT asset that is taxable Australian real property. Therefore, the acquisition of a lease from a foreign resident vendor with a market value of \$750,000 or more would be subject to the 12.5% withholding, unless the lessor provided the lessee with a clearance certificate.

However, the withholding obligation only arises with respect to any lease premium paid by the lessee to acquire the lease, as they form part of the first element of the cost base of the lease.

A lease that does not include the payment of a premium will not result in a withholding liability.

Rent payable under the term of the lease does not form part of the first element of the cost base.

Example: Granting a lease

Foreign resident Richard owns a commercial property that he leases to Leigh. As a foreign resident, Richard is not entitled to a clearance certificate.

Under the terms of the lease, Leigh agrees to pay Richard \$3 million as a premium for granting the lease and to pay periodic rent of \$4,000 a month.

The first element of the cost base of Leigh's lease asset is \$3 million. Leigh must withhold and pay 12.5% of this amount (\$375,000) to us.

The rent payable under the lease does not form part of the first element of cost base.

Withholding tax credits and refunds

Withholding tax credits

A foreign resident vendor must lodge a tax return at the end of the financial year, declaring their Australian assessable income and including any capital gain from the disposal of their asset. The vendor will claim a credit for any withholding amount paid to us by the purchaser in their tax return.

The availability of a credit to a foreign resident is contingent on the purchaser paying the amount to us. A credit does not arise merely because an amount has been withheld.

A foreign resident vendor disposing of Australian property to which these withholding tax rules apply should apply for a tax file number (TFN) before they lodge an Australian tax return. This will ensure they can claim a credit for the amount withheld and paid to us by the purchaser.

In certain circumstances, an **early income tax return** may be submitted. If a foreign resident vendor is not eligible to submit an early income tax return, they must wait until the end of the financial year to do so. However, they will receive a tax credit for the withholding paid by the purchaser.

Refunds

We may refund an amount incorrectly withheld and paid by the purchaser. The vendor can't claim a refund from the purchaser.

The FRCGW amount has not been incorrectly withheld where either:

- the vendor is entitled to a clearance certificate or variation and didn't obtain one
- the vendor obtained a clearance certificate or variation but didn't provide it to the purchaser at or before settlement.

Vendors who don't provide a clearance certificate or variation to the purchaser at or before settlement will need to lodge a tax return and claim a FRCGW credit for the withheld amount. A credit for the amount withheld for foreign resident capital gains is applicable to the year the contract was signed. Therefore, it may take some time before the vendor can lodge the tax return to declare the capital gain, be assessed and then given any applicable refund for the amount withheld.

Penalties for non-compliance

Under this measure, the purchaser must both withhold and pay that withholding to us, even if they use representatives to assist them in the process.

Administrative penalties apply for failure to adhere to the foreign resident capital gains withholding legislation.

The offence provision for failing to withhold also applies.

A general interest charge is imposed for amounts not paid to us by the required date.

It is an offence to falsely claim a credit.

The law imposes penalties of up to 120 penalty units for declarations or purported declarations that are false or misleading.

Glossary

Indirect Australian real property interest

Where two tests are satisfied: the non-portfolio interest test, and the principal asset test. Indirect Australian real property interest includes shares in a company or units in a trust.

Knowledge condition

Where the purchaser knows, or has reason to believe, that the vendor is a relevant foreign resident.

Non-final withholding tax

A non-final withholding tax is collected as an estimate of the recipient's final income tax liability. The recipient is still required to lodge an income tax return and pay any outstanding debit. They claim a credit for the amount of tax withheld in the income tax return at this time.

Non-portfolio interest test

An interest held by an entity (the holding entity) in another entity (the test entity) is a non-portfolio interest if the sum of the membership interests held by the holding entity (and their associates) in the test entity is 10% or more.

The test is satisfied if the membership interest is a non-portfolio interest at the time of the transaction, or through a 12-month period in the last 24 months leading up to the transaction.

Relevant asset (also referred to 'assets that the law applies to' in this guide)

This is taxable Australian real property, an indirect Australian real property interest, or an option or right to acquire such property or such an interest.

Relevant foreign resident vendors (also referred to as 'vendors that the law applies to' in this guide)

The vendor is a relevant foreign resident if one or more of these scenarios apply:

- The purchaser knows the vendor is a foreign resident.
- The purchaser reasonably believes the vendor is a foreign resident.
- The purchaser does not reasonably believe the vendor is an Australian resident, and either
 - the vendor has an address outside Australia (according to any record that is in the purchaser's possession, or is kept or maintained on their behalf, about the transaction)
 - the vendor authorises provision of a related financial benefit to a place outside Australia (whether to the vendor or to anyone else).
- The vendor has a connection outside Australia of a kind specified in the regulations.

Principal asset test

This is used to determine if 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.

Taxable Australian real property

This is real property situated in Australia (including a lease of land situated in Australia), or a mining, quarrying or prospecting right (to the

extent that the right is not real property), if the minerals, petroleum or quarry materials are situated in Australia.

More information

For more information and forms, visit ato.gov.au/FRCGW.

Legislation and supporting materials

- [Treasury Laws Amendment \(Foreign Resident Capital Gains Withholding Payments\) Act 2017 \(Act No. 57 of 2017\)](#)  – received royal assent on 22 June 2017
- [Tax and Superannuation Laws Amendment \(2015 Measures No. 6\) Act 2016](#)  – received royal assent on 25 February 2016

Law companion rulings

The following rulings describe how we apply the law:

- Foreign resident capital gains withholding regime: the Commissioner's variation power
- Foreign resident capital gains withholding regime: amount payable to the Commissioner
- Foreign resident capital gains withholding regime: options

QC 52808

Our commitment to you

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.

Some of the information on this website applies to a specific financial year. This is clearly marked. Make sure you have the information for the right year before making decisions based on that information.

If you feel that our information does not fully cover your circumstances, or you are unsure how it applies to you, contact us or seek professional advice.

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