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Capital gains withholding: Impacts on foreign and Australian residents

Foreign resident capital gains withholding first applied to vendors disposing of certain taxable Australian property under contracts entered into from 1 July 2016. A 10% non-final withholding was applied to these transactions at settlement.

New rules for foreign resident capital gains withholding (FRCGW) apply to vendors disposing of certain taxable property under contracts entered into from 1 July 2017. The changes will apply to real property disposals where the contract price is \$750,000 and above (previously \$2 million) and the FRCGW withholding tax rate will be 12.5% (previously 10%). The existing threshold and rate will apply for any contracts that are entered into from 1 July 2016 and before 1 July 2017, even if they are not due to settle until after 1 July 2017.

Background

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.

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 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 12.5% withholding by providing one of the following to the purchaser prior to settlement:
 - for Australian real property, a clearance certificate obtained from the ATO
 - for other asset types, a vendor declaration they are not a foreign resident.
- **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.

Find out about:

- [Asset types](#)
- [Foreign resident vendor](#)
- [Clearance certificates](#)
- [Vendor declarations](#)
- [Variations](#)
- [Calculating the withholding](#)
- [Paying the withholding](#)

- [Lodging an income tax return](#)

Online forms and instructions

- [Online Clearance certificate application for Australian residents \(/frcgw_clearance_certificate.aspx\)](#)
- [Instructions for the online clearance certificate application \(/Forms/Capital-gains-withholding-clearance-certificate-application-online-form-and-instructions---for-Australian-residents/\)](#)
- [Online Variation application for foreign residents and other parties \(/frcgw_variation.aspx\)](#)
- [Instructions for the online variation application \(/Forms/Foreign-resident-capital-gains-withholding-rate-variation-application-online-form-and-instructions/\)](#)
- [Online Purchaser payment notification \(/frcgw_payment_notification.aspx\)](#)
- [Instructions for the online purchaser payment notification \(/Forms/Foreign-resident-capital-gains-withholding-purchaser-payment-notification-online-form-and-instructions/\)](#)

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

* 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.

Excluded assets

Some assets are not subject to the withholding including:

- taxable Australian real property with a market value of less than \$750,000. This ensures the vast majority of residential house sales will be unaffected by this measure
- 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 or a crossing system (for example, disposal of shares in dark pools)
- 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.

Find out about:

- [Situations involving mortgagors and mortgagees \(/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Foreign-resident-capital-gains-withholding-payments---common-questions/?page=1#Situations_involving_mortgagors_and_mortgagees\)](#)

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 the ATO
- any other asset where the purchaser is given a vendor declaration.

Vendor

Who is the 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.

Is the vendor a foreign resident?

A vendor is a relevant foreign resident if either:

- the purchaser knows or has reasonable grounds to believe 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 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).

A vendor is treated as a foreign resident if the vendor either:

- doesn't provide the purchaser with 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
- doesn't provide the purchaser with a valid vendor declaration stating they are an Australian resident, 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.

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 the ATO.

We process applications in order of date of receipt. To avoid possible delays in your settlement, apply online for a clearance certificate at least 14 days before you require it – see [How long will it take?](#)

How to apply

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

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 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 an application. 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 or **+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 the vendor fails to provide the clearance certificate by settlement, the purchaser is required to withhold 12.5% of the purchase price.

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.

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 – this ensures faster processing – as part of the settlement process. Use this form: [Capital gains withholding clearance certificate application instructions – for Australian residents \(/Forms/Capital-gains-withholding-clearance-certificate-application-instructions---for-Australian-residents/\)](#)

Next steps:

- [Find out if you are an Australian resident for tax purposes \(/Individuals/International-tax-for-individuals/Work-out-your-tax-residency/\)](#)

*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, or for the Foreign Investment Review Board (FIRB) applications to buy Australian property.

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.

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 the ATO 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 **at least 14 days** before you require it.

How long will it take?

We automatically process around half of all applications, which means we can issue a clearance certificate within days of receiving these application. However, we have to manually process the remaining half, which means we can issue a clearance certificate in 14 to 28 days of receiving these applications.

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

If you lodge your application within days of the settlement date and it requires manual processing, 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. 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.

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.

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

All parties on the Certificate of Title will require a clearance certificate. For example, joint tenants / tenants in common will need to fill out two forms. It is the vendor's responsibility to provide the purchaser with the clearance certificate and ensure it's valid.

For the purchaser to rely on the clearance certificate, the ATO requires the following three conditions be met:

- The name of the vendor on the certificate must match the name on the certificate of title (unless proof of name change is provided, for example a marriage certificate issued from an Australian state or territory registry).
- The date the certificate is given to the purchaser must be a date that falls within the time period for which the clearance certificate is valid (this allows vendors to apply for clearance certificates after the date the transaction has been entered into).
- The clearance certificate must be provided to the purchaser before settlement.

Note: The ATO will **not** reissue certificates for the following reasons:

- The ATO is currently issuing clearance certificates for individuals based on the name format used for all ATO notices – First Name, Initial and Last Name. The ATO accepts that purchasers have fulfilled their obligation if they have sighted a certificate where the First Name, Initial and Last Name or First Name and Last Name are consistent with the name on the title.
- An honorific match is not required to fulfil the purchaser's obligations.
- A correct address on a certificate is not required to fulfil the purchaser's obligations. You will notice the representative's copy of the certificate does not have the vendor's address, whereas the vendor's copy currently does.
- When a trustee requests inclusion of the instrument number. This is because it is not necessary to have the instrument number to a title deed on the clearance certificate – for example 'Trustee under instrument ###'.

If the name of the vendor on the clearance certificate doesn't match the name of the vendor on the certificate of title, and the purchaser is not satisfied by the proof of name change, the vendor may contact us by phoning **13 28 66** (Fast Key Code 4,2), seeking a revised clearance certificate. The vendor needs to provide us with documentary evidence of the change in name so we can issue the revised certificate.

When a purchaser receives a clearance certificate from a vendor and sees it's 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:

- BET number (that is, transaction ID) 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 foreign resident capital gains withholding clearance certificate application provide specific details about how the form should be completed.

For trusts and superannuation funds, if the entity that has legal title to the asset is the trustee (with no mention of the trust/fund or 'in holding the property on trust'), then 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.

Example 1

ABC Pty Ltd is the corporate trustee of the XYZ Family Trust. ABC Pty Ltd currently holds a parcel of land in its capacity as trustee on behalf of XYZ Family Trust. The certificate of title is solely registered in the name of ABC Pty Ltd (with no mention of the XYZ Family Trust). ABC Pty Ltd should apply for a clearance certificate in its own capacity as a company using its own TFN or ABN (if it has one) and ACN.

Example 2

Joe Bloggs is the trustee of the LMN Family Trust. Joe Bloggs currently holds a parcel of land in his capacity as trustee on behalf of LMN Family Trust. The certificate of title is solely registered in the name of Joe Bloggs (with no mention of the LMN Family Trust). Joe Bloggs should apply for a clearance certificate in his own capacity as an individual using his own TFN.

The trust or the trustee in the capacity of the trustee of the trust – then the entity is the trust that applies using the TFN and/or ABN of the trust as the identifier (if they have one). The certificate will be issued in the name as it appears on our system. Phone us on **13 28 66** (Fast Key Code 4,2) if you require a revised certificate to issue where the title on the property is different. For example, if our system contains 'The trustee for ABC Trust' whereas the title contains 'XYZ as the trustee for ABC Trust'.

Consolidated groups and multiple entry groups

We can give head companies or provisional head companies of income tax consolidated groups and multiple entry groups confirmation that a clearance certificate issued to the head company, also applies to all of its subsidiary entities.

We'll issue a clearance certificate to the head company which includes the members of the group as an attachment. Note we will 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 if they wish.

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.

Is the 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.

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 all 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 is 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 they are an Australian tax resident, the purchaser will not treat them as a foreign resident.

Alternatively, the vendor may 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 interest 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.

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.

When is a declaration from a vendor valid?

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.

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

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.

Templates that can be used for this purpose are available here: [Foreign resident capital gains withholding – vendor declaration \(PDF, 222KB\)](#)
(/uploadedFiles/Content/LB_I/downloads/Foreign%20resident%20capital%20gains%20withholding%20-%20vendor%20declaration.pdf)

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.

A false vendor declaration

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 does not, 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, and 40 penalty units where the declaration is false or misleading as a result of the vendor failing to take reasonable care.

The penalty is payable in addition to the 12.5% withholding that would have been imposed by the purchaser, had the vendor not made a false or misleading declaration.

Variations

Vendors can apply for a variation where:

- they're not entitled to a clearance certificate
- a vendor's declaration is not appropriate
- 12.5% withholding is too high compared to 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.

Note: New rules for foreign tax residents were proposed in the 2017–18 Budget to take effect from 9 May 2017. Foreign tax residents will no longer be able to claim the main residence CGT exemption when they sell property in Australia.

Foreign tax residents who already hold property on 9 May 2017 will be able to claim the main residence CGT exemption until 30 June 2019.

Legislative Instruments

We have issued a class variation in relation to:

- [deceased estates and legal personal representatives \(https://www.legislation.gov.au/Details/F2016L01396\)](https://www.legislation.gov.au/Details/F2016L01396)
- [income tax exempt entities \(http://www.legislation.gov.au/Details/F2017L00390\)](http://www.legislation.gov.au/Details/F2017L00390)
- [marriage or relationship breakdowns \(https://www.legislation.gov.au/Details/F2016L01642\)](https://www.legislation.gov.au/Details/F2016L01642) .

See also:

- [Foreign resident capital gains withholding – common questions – Deceased estates \(/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Foreign-resident-capital-gains-withholding-payments---common-questions/?page=1#Deceased_estates\)](#)

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 \(/frcgw_variation.aspx\)](#) .

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 – this ensures faster processing – as part of the settlement process. Use this form: [Foreign resident capital gains withholding rate variation application: instructions \(/Forms/Foreign-resident-capital-gains-withholding-rate-variation-application-instructions/\)](#)

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.

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.

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 not withhold.

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.

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.

Is the withholding an additional payment on top of the agreed purchaser 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.

Does withholding apply 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.

What happens 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 vendor has not received the agreed purchase price for the asset.

Multiple purchasers (the ATO online form will assist 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

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 assist 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.

See also:

- Legislative Instrument – [Variation 47 \(/law/view/document?docid=%22PYV%2FVaria047%2F00001%22\)](#)
-

Examples

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.

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.

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%.

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 not be 12.5%, but the withholding rate as specified on the variation notice issued by the ATO to that particular foreign resident vendor. It may be the purchaser has to withhold 8% from one vendor, and 3% from another vendor.

What if 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.

However, 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.

* 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.

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.

How much do I withhold if I am 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 do not form part of the first element of the cost base, so withholding does not apply to this amount.

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. However, where the market value of the option being acquired is less than \$10 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 – excluding what the purchaser already paid for the option, and the market value of any property they gave for the option (or to renew or extend the option).

Paying the withholding

Who is liable to pay the withholding?

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

When is the payment required to be made?

To pay the withholding to us, the purchaser must complete an online [Foreign resident capital gains withholding Purchaser Payment Notification form \(/frcgw_payment_notification.aspx\)](#) so they receive a payment reference number (PRN) and a PDF icon for a payment slip and barcode. This should be done before the day of settlement, as the purchaser 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.

There will be a separate PRN for each purchaser, even if all their details were supplied on the one purchaser payment notification form.

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

Purchaser payment notification form

Note: Purchasers are not required to notify us of a transaction where:

- the purchase price of the real property is less than \$750,000
- all vendors have supplied clearance certificates
- 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.

There will be a separate PRN for each purchaser, even if all their details were supplied on the one purchaser payment notification form.

How to pay

There are three methods the purchaser can use to pay us:

- 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

- 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.

- Mail a cheque to the ATO 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.

What happens 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 all purchasers and vendors involved in the sale of the asset. 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 purchasers and the vendors.

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

How do I pay if I am travelling and may not have access to the internet?

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 form: instructions \(/Forms/Foreign-resident-capital-gains-withholding-purchaser-payment-notification-form-instructions/\)](#)

Foreign resident capital gains withholding and the tax return

Does the vendor still need to lodge an income 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. The vendor will claim a credit for any withholding amount in their tax return.

If an Australian tax resident vendor 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 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 vendor disposing of Australian property to which these withholding tax rules apply, should 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 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 submit their income tax return 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.

Common questions

For additional information and how we administer the legislation see:

- [Foreign resident capital gains withholding – common questions \(/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Foreign-resident-capital-gains-withholding-payments---common-questions/\)](/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Foreign-resident-capital-gains-withholding-payments---common-questions/)

The ATO has extensively consulted with external stakeholders on the Foreign Investment Reforms Working Group and is willing to add further guidance if required.

Law companion guidelines

The following guidelines describe we apply the law:

- [Foreign resident capital gains withholding regime: the Commissioner's variation power \(/law/view/document?DocID=COG/LCG20165/NAT/ATO/00001&PiT=99991231235958\)](/law/view/document?DocID=COG/LCG20165/NAT/ATO/00001&PiT=99991231235958)
- [Foreign resident capital gains withholding regime: amount payable to the Commissioner \(/law/view/document?DocID=COG/LCG20166/NAT/ATO/00001&PiT=99991231235958\)](/law/view/document?DocID=COG/LCG20166/NAT/ATO/00001&PiT=99991231235958)
- [Foreign resident capital gains withholding regime: options \(/law/view/document?DocID=COG/LCG20167/NAT/ATO/00001&PiT=99991231235958\)](/law/view/document?DocID=COG/LCG20167/NAT/ATO/00001&PiT=99991231235958)

Legislation and supporting materials

On 22 June 2017 [Treasury Laws Amendment \(Foreign Resident Capital Gains Withholding Payments\) Act 2017 \(Act No. 57 of 2017\)](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5891) (http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5891) received royal assent.

On 25 February 2016 the [Tax and Superannuation Laws Amendment \(2015 Measures No. 6\) Act 2016](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5585) (http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5585) received royal assent.

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

- [Online Clearance certificate application for Australian residents \(/frcgw_clearance_certificate.aspx\)](/frcgw_clearance_certificate.aspx)
- [Instructions for the online clearance certificate application \(/Forms/Capital-gains-withholding-clearance-certificate-application-online-form-and-instructions---for-Australian-residents/\)](/Forms/Capital-gains-withholding-clearance-certificate-application-online-form-and-instructions---for-Australian-residents/)
- [Online Variation application for foreign residents and other parties \(/frcgw_variation.aspx\)](/frcgw_variation.aspx)
- [Instructions for the online variation application \(/Forms/Foreign-resident-capital-gains-withholding-rate-variation-application-online-form-and-instructions/\)](/Forms/Foreign-resident-capital-gains-withholding-rate-variation-application-online-form-and-instructions/)
- [Online Purchaser Payment Notification – Foreign resident capital gains withholding \(/frcgw_payment_notification.aspx\)](/frcgw_payment_notification.aspx)
- [Instructions for the online purchaser payment notification \(/Forms/Foreign-resident-capital-gains-withholding-purchaser-payment-notification-online-form-and-instructions/\)](/Forms/Foreign-resident-capital-gains-withholding-purchaser-payment-notification-online-form-and-instructions/)
- [Overview: Webinar on Foreign resident capital gains withholding payments \(http://tv.ato.gov.au/ato-tv/media?v=bd1bdiub5aqyzd\)](http://tv.ato.gov.au/ato-tv/media?v=bd1bdiub5aqyzd) - lets-talk.gov.au/BusinessWebinars
- [Webinar on Foreign resident capital gains withholding payments – indirect interests \(http://tv.ato.gov.au/ato-tv/media?v=bd1bdiubhfz1no\)](http://tv.ato.gov.au/ato-tv/media?v=bd1bdiubhfz1no)
- [Foreign resident capital gains withholding – common questions \(/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Foreign-resident-capital-gains-withholding-payments---common-questions/\)](/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Foreign-resident-capital-gains-withholding-payments---common-questions/)
- [Capital gains withholding - for real estate agent \(/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding---for-real-estate-agents/\)](/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding---for-real-estate-agents/)
- [Capital gains tax withholding - a guide for conveyancers \(/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding---a-guide-for-conveyancers/\)](/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding---a-guide-for-conveyancers/)

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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