



**LAW
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VICTORIA**

FOREIGN RESIDENT CAPITAL GAINS WITHHOLDING PAYMENT MEASURE

PRACTITIONER GUIDE

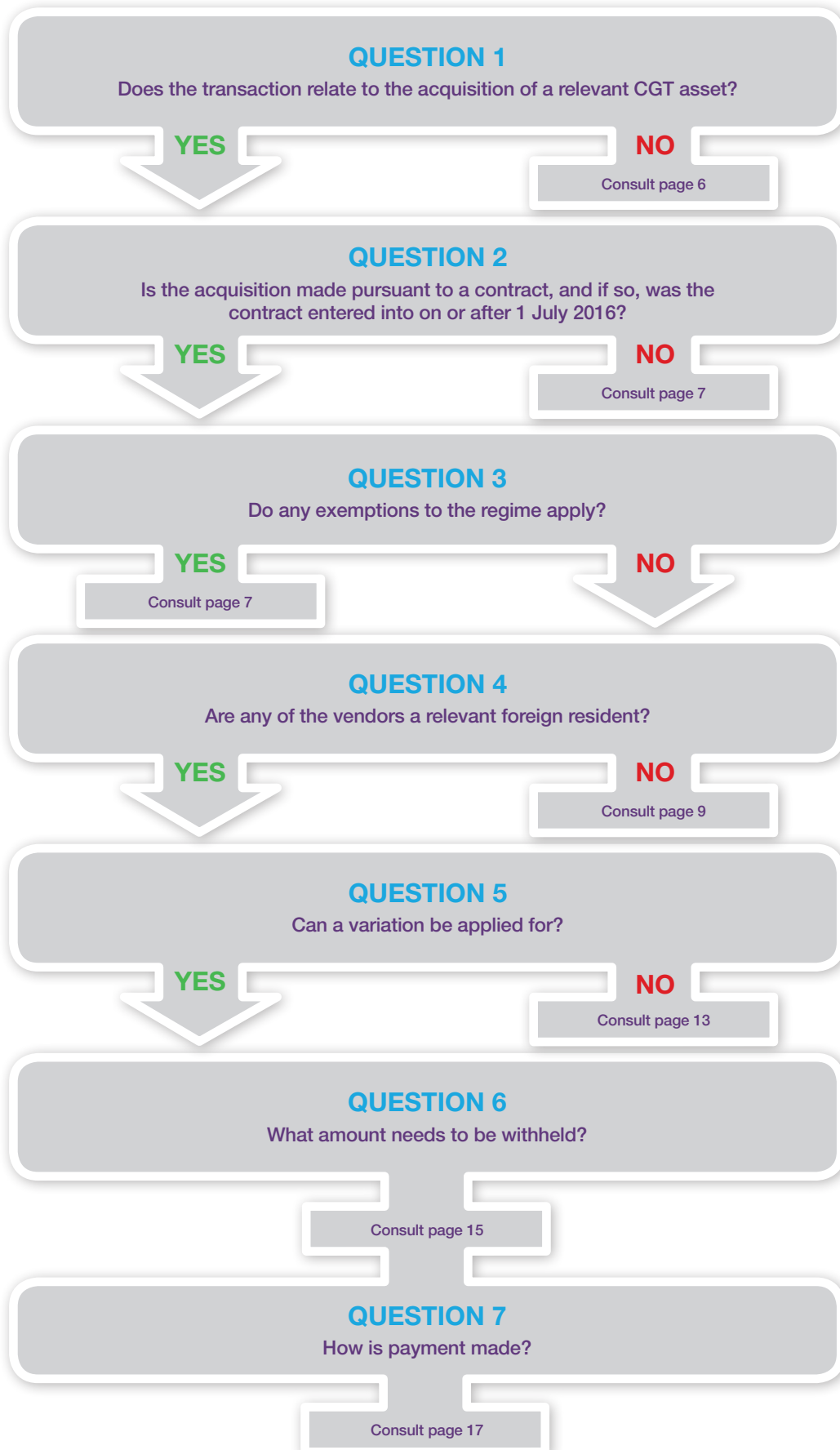


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FRCGW Overview Flowchart



If in doubt seek advice from an accredited tax specialist.

Glossary

The table below sets out acronyms used in this guidebook.

| TERM | ACRONYM |
|--|-----------|
| Australian Taxation Office | ATO |
| <i>Tax and Superannuation Laws Amendments (2015 Measures No. 6) Act 2016</i> (Cth) | the Act |
| Capital gains tax | CGT |
| Electronic funds transfer | EFT |
| Foreign Investment Review Board | FIRB |
| Foreign residents capital gains withholding regime. This measure is contained in Schedule 1 Part 5 of the Act which introduced a new Subdivision 14-D in Schedule 1 to the <i>Taxation Administration Act 1953</i> (Cth) (TAA) | FRCGW |
| Goods and services tax | GST |
| Indirect Australian real property interest | IRPI |
| <i>Income Tax Assessment Act 1936</i> (Cth) | ITAA 1936 |
| <i>Income Tax Assessment Act 1997</i> (Cth) | ITAA 1997 |
| Taxable Australian real property | TARP |
| <i>Taxation Administration Act 1953</i> (Cth) | TAA |
| Tax file number | TFN |

Background

From 1 July 2016, a new measure to introduce a 10 percent non-final withholding tax on payments made to foreign residents that dispose of certain taxable Australian property will come into effect.

The measure is contained in Schedule One Part 5 of the *Tax and Superannuation Laws Amendments (2015 Measures No. 6) Act 2016* (Cth) (the Act) which introduced a new Subdivision 14-D in Schedule 1 to the *Taxation Administration Act 1953* (Cth) (TAA). The Act had bi-partisan support and received Royal Assent on 25 February 2016. A copy of the legislation is available at www.legislation.gov.au/Details/C2016C00258.

The Australian Taxation Office (ATO) refers to this measure as “the foreign resident capital gains withholding payment”.

For the purpose of this guide, the measure shall be described as the “FRCGW”.

What is the FRCGW?

The FRCGW generally requires the purchaser of certain Australian assets:

- to withhold from relevant foreign resident vendors an amount (generally equivalent to 10 percent of the purchase price or otherwise as varied by the Commissioner of Taxation); and
- pay the amount to the Commissioner on or before the purchaser becomes the owner of the relevant asset.

Broadly speaking, unless there is a specific exception, the withholding obligation applies for acquisitions on or after 1 July 2016 when the asset being disposed of by the relevant foreign resident is:

- taxable Australian real property (TARP);
- an indirect Australian real property interest (IRPI); or
- an option or right to acquire such property or interest.

For more information go to FAQs.

Why do I need to know about it?

Despite its name, the FRCGW applies to all Australian tax residents, not just foreign residents. The FRCGW in effect presumes all vendors to be foreign residents unless and until they take the required steps to prove otherwise. Similarly, the FRCGW does not only apply to real estate conveyances. It also applies to indirect real property interests (discussed in more detail below).

Accordingly, all prudent Australian legal practitioners need to be familiar with the FRCGW to ensure they properly advise their clients about their legal obligations under the FRCGW.

1 DOES THE TRANSACTION RELATE TO THE ACQUISITION OF A RELEVANT CGT ASSET?

1. What is a “relevant CGT asset”?

A relevant CGT asset is either:

- a. taxable Australian real property (TARP);
- b. an indirect Australian real property interest (IRPI); or
- c. an option or right to acquire such property or such an interest.

2. What is TARP?

TARP is real property situated in Australia (including a lease of land if the land is 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.¹

3. What is IRPI?

At any time, a membership interest² held by an entity (holding entity) in another entity (test entity) is IRPI if:

- a. at that time, or during a 12 month period over the last two years, the interest passed the non-portfolio interest test; and
- b. the interest passed the principal asset test.³

4. What is the non-portfolio interest test?

The non-portfolio interest test is satisfied if the holding entity holds a 10 percent or more membership interest in the test entity. That is, the sum of the direct participation interests held by the holding entity and its associates in the test entity at that time are 10 percent or more.⁴

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.⁵

Ask: has the vendor held a 10 percent or greater interest in the entity it is disposing of its interest/ rights in during the past two years?

5. What is the principal asset test?

To satisfy the principal asset test, the sum of the market value of the entity's assets that are TARP must exceed the sum of the market value of the assets that are not TARP assets.⁶

Ask: do the entity's TARP assets exceed the sum of its non-TARP assets?

1 Section 855-20 *Income Tax Assessment Act 1997* (Cth) (ITAA 1997)

2 A membership interest is defined under section 960-135 ITAA 1997. Each interest/set of interests or right/set of rights in respect of the entity by virtue of which you are a member of the entity is a membership interest you have in the entity.

3 Section 855-25 ITAA 1997

4 Section 960-195 ITAA 1997

5 Section 960-195 ITAA 1997

6 Section 855-30 ITAA 1997



IS THE ACQUISITION MADE PURSUANT TO A CONTRACT, AND IF SO, WAS THE CONTRACT ENTERED INTO ON OR AFTER 1 JULY 2016?

6. The relevant acquisition is pursuant to a contract entered into before 1 July 2016.

Does FRCGW apply?

No. FRCGW only applies to acquisitions made under a contract if the contract is entered into on or after 1 July 2016.⁷

7. The acquisition is not pursuant to a contract. Does FRCGW apply?

For transactions not pursuant to a contract, FRCGW will apply where the acquisition is made or deemed to be made on or after 1 July 2016. Refer to the general acquisition rules at section 109-5 of the ITAA 1997 to determine the acquisition date. Generally, the acquisition date is the time at which the purchaser becomes the owner of the relevant asset. However, for options the acquisition date will be the date of exercise of the option, not when the option was entered into.⁸

If in doubt, seek advice from an accredited tax specialist.

⁷ Section 43 *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016* (Cth) ('the Act')

⁸ See CGT Determination Number 16

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DO ANY EXEMPTIONS APPLY?

8. What transactions are excluded from FRCGW?⁹

Pursuant to section 14-215 in Schedule 1 of the TAA, the following transactions are excluded from FRCGW:

- a. TARP where the market value is less than \$2 million;
- b. IRPI which causes a company title interest to arise¹⁰ (IRPI company title), where the market value of the CGT asset is less than \$2 million;
- c. where the transaction is on an approved stock exchange;
- d. where the transaction is conducted using a crossing system;¹¹
- e. where an existing withholding tax obligation applies;
- f. where a securities lending arrangement to which section 26BC(3) *Income Tax Assessment Act 1936* (Cth) (ITAA 1936) applies as a result of the transaction being covered by section 26BC(3)(a)(ii) ITAA 1936;
- g. where any relevant vendor entity is under external administration pursuant to paragraph 161A(1)(a) of the *Corporations Act 2001* (Cth), or in the same or similar position under foreign law; and
- h. where the transaction arises from formal insolvency or bankruptcy proceedings.

Important note for practitioners: note that the \$2 million threshold only applies where the CGT asset is a TARP asset or IRPI company title. For all other relevant CGT assets (eg IRPI assets where no company title arises or options or rights to acquire TARP or IRPI assets), there is no exemption for assets with a market value of less than \$2 million.

9. What is an existing withholding obligation?

An example of an existing withholding obligation is where a trustee has a liability to pay tax under section 98 of the ITAA 1936. This is just one example from the wide range of existing withholding obligations.

If in doubt, advice should be sought from an accredited tax specialist.

10. How is “market value” defined?

Refer to question 33 on page 15.

⁹ Schedule 1, section 14-215 of the TAA

¹⁰ Defined by section 317 ITAA 1936 to mean: “...in relation to land...a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in a company that owns the land or building.”

¹¹ Within the meaning of the market integrity rules (pursuant to Schedule 1, section 14-215(1)(c) TAA)

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IS THE VENDOR A RELEVANT FOREIGN RESIDENT?

Foreign resident

11. Who is a relevant foreign resident?

In the case of relevant TARP and IRPI company title assets, each vendor entity is considered to be a relevant foreign resident unless the entity provides the purchaser with a clearance certificate for each vendor entity. This can be provided at any time on or before the purchaser becomes the owner of the asset.

For other CGT assets, if the purchaser knows or reasonably believes a vendor is a foreign resident, the vendor will be deemed to be a foreign resident unless they provide the purchaser with a vendor declaration.

In the case of other CGT assets, where the purchaser does not reasonably believe an entity is an Australian resident (and unless they provide the purchaser with a residency or interest declaration), the vendor is deemed to be a foreign resident when:

- a. the entity has an address outside of Australia according to records in the purchaser's possession or maintained on the purchaser's behalf about the transaction;
- b. the entity is authorised to provide a related financial benefit to a place outside of Australia (whether to the entity or anybody else); or
- c. the entity has a connection outside Australia of a kind specified in the regulations.¹²

Important note for practitioners: to provide guidance, the ATO has an “Are you a resident” calculator on their website at www.ato.gov.au/Calculators-and-Tools/Are-You-A-Resident/. However, the issue of whether a practitioner knows or reasonably believes an entity is a foreign resident is complex and includes consideration of the content of documents not only held by the purchaser's practitioner but those held “on the purchaser's behalf” including documents held by the purchaser's accountant or another lawyer engaged by the client. Practitioners should advise their clients to consider obtaining advice from an accredited tax specialist if this is in doubt.

12. Is a “foreign resident for tax purposes” the same as for other areas of tax law?

No. Residency status for tax purposes is not the same as that used for immigration purposes, or for the purposes of the Foreign Investment Review Board (FIRB).

¹² At the time of publication of this guide, the regulations are yet to be made. The LIV will keep members informed of developments.

Clearance certificates

13. How do I apply for a clearance certificate?

The vendor applies for the clearance certificate. The clearance certificate application can be completed by either the vendor, or their authorised agents (eg tax agent, legal representative).

At the time of publication of this guide, conveyancers who are not legal practitioners or tax agents cannot complete the form on behalf of the vendor. However, the vendor may provide a completed and signed paper form to their conveyancer to be keyed in electronically or to be sent (the paper form) to the ATO on the vendor's behalf.

The certificate will only be issued to Australian tax residents. The ATO will introduce an online form to be completed for obtaining a clearance certificate. The LIV understands that the online form will be available on the ATO website at www.ato.gov.au/FRCGW from 27 June 2016.

A PDF version of the form will be available on the ATO website at www.ato.gov.au/FRCGW from late May 2016. It has been advised that this form should only be considered for contracts being entered into from 1 July 2016 and settling in the first two weeks of July 2016.

The application can be made at any time up until settlement, even before there is a contract. The clearance certificate application is vendor, not transaction, specific and is valid for that vendor for 12 months. Where the settlement date is after the expiry date, the purchaser may rely on the clearance certificate as being valid as long as the date it is made available to the purchaser is within the clearance certificate period stated on the certificate.

Vendors need to provide a clearance certificate on or before the settlement of the transaction. A clearance certificate must be valid at the time it is provided to the purchaser.

Important note for practitioners: the form will ask for the vendor's address. This is the actual residential address of the vendor and not their address for service or postal address. It is relevant to the assessment of whether or not the vendor will be deemed a foreign resident for the purpose of FRCGW.

14. What happens if the name of the vendor on the certificate of title is different to names used on other tax documents?

The name on the application form for the vendor needs to match the name on the certificate of title. The vendor should be the entity that has legal title to the asset. If the legal title of the property is in the name of the trustee who is holding the property on behalf of a trust or superannuation fund, then it is the trustee that should apply for the clearance certificate.

With respect to individuals, as the ATO has not historically recorded tax users' middle names, the online form only allows first and last names to be entered. If the certificate of title contains a middle name, then the middle name should be entered following the first name in the same field.

Where there is an inconsistency between the name on the title and other identification or ATO tax records (eg where there is a middle name on the title but not on other documents, where a party has changed their name or where the order of names is not the same on various documents) the ATO will need to manually process the application. This will extend the timeframe for the issuance of a clearance certificate.

Uploading supporting documentation in the online form may assist the ATO to reconcile discrepancies between names and speed up the process.

Important note for practitioners: practitioners should, at an early stage of their engagement, check the names on the title as well as the vendor's tax returns and notice of assessment to assess whether there is likely to be any issues with reconciling names and advise their client of the anticipated timeframes.

15. The form asks for a Tax File Number (TFN), do I have to provide one?

While the online application asks for a TFN, this is not a compulsory field. Practitioners need to be aware that in particular circumstances, it is an offence under section 8WB of the TAA to record or divulge a client's TFN number without authorisation. Practitioners ought to be mindful of this if a client provides them with their TFN.

16. What information do I need to complete the online application on behalf of the vendor?

The information required will depend on whether the vendor is an individual, company or trust and will focus on the vendor's status as an Australian tax resident. If the vendor's circumstances are not straightforward and cannot easily be answered through the options available on the form, supporting documentation can be uploaded to support the vendor's application. However, practitioners should note that applications with attached supporting documentation will not be able to be processed automatically. The ATO estimates in these cases manual processing will take between 14–28 days.

17. How does the ATO assess the application?

The ATO will assess the vendor's application based on the information already available in the ATO's database. If the ATO has sufficient information in their database to assess the application and/or the information is consistent, the assessment will be an automatic process and the clearance certificate will be issued within days of the application being submitted.

If there is insufficient or inconsistent information, the application will be referred for manual processing. The ATO estimates manual processing will take 14–28 days.

Practitioners should advise their client that the ATO may contact the applicant to clarify the information submitted with the form or request further information in order to process the application.

18. Who receives the certificate once the application is successfully processed?

The clearance certificate will be sent by the ATO to both the vendor and their contact (authorised agent). The online form asks for an email address and the certificate will be sent to that address when provided. If an email address is not provided, then it will take longer to receive the clearance certificate.

The certificate needs to be valid and provided to the purchaser or the purchaser's representatives prior to settlement to alleviate the purchaser of their obligation to withhold.

19. How can I, as the purchaser's representative, check the validity of the clearance certificate provided to the purchaser?

The legislation does not require the purchaser to check the validity of the clearance certificate before acting upon it. However, the purchaser or their representative may call the ATO on 13 28 66 if they wish to confirm the validity of a clearance certificate. The purchaser would need to provide the ATO with the transaction number from the "our reference" field at the top of the clearance certificate and the vendor's name as it appears on the clearance certificate. Once that information is provided, the ATO will verify for the purchaser the clearance certificate number, name of the vendor and the period for which the clearance certificate is valid.

The ATO is currently investigating an electronic alternative which it hopes will be available for use from 1 July 2017. The LIV will keep members informed of developments.

20. Can you apply for a clearance certificate retrospectively?

No. If the vendor has not provided the purchaser with a valid clearance certificate prior to settlement, then the purchaser is under a strict liability to withhold and pay the required amount to the Commissioner. The vendor then needs to lodge their tax return to obtain a tax credit for the withheld amount.

For the ATO's latest information regarding clearance certificates, see www.ato.gov.au/FRCGW.

21. What happens if there are multiple properties?

The clearance certificate is vendor specific, rather than property specific, so the same clearance certificate can be used for multiple properties by the same vendor, provided that the disposal of the properties falls within the period for which the certificate is valid.

The clearance certificate is not required to be valid at the date of settlement; however in such cases it must have been valid at the date of the contract and provided to the purchaser. If it is not valid at the date of the contract, then a new clearance certificate will need to be obtained and provided to the purchaser on or before settlement.

Vendor declarations

22. What is a vendor declaration?

Vendor declarations can be made where the property is not TARP or IRPI company title. There are two types of declarations that a vendor can make:

- a. a declaration that they are an Australian resident for income tax purposes; or
- b. where the CGT asset acquired is a membership interest, a declaration that the interest is not IRPI.

A vendor declaration is valid for six months from the date it is signed by the vendor.¹³

Important note for practitioners: a declaration can be included as part of the documents of sale for the relevant asset. The ATO will have templates available for practitioners to download from their website from 1 July 2016.

23. When can the declaration be relied on?

The declaration supplied by a vendor can be relied on by the purchaser unless the purchaser “knows the declaration to be false”. The ATO considers that a purchaser will know a declaration to be false if they were a party to the fraud or have knowledge that the declaration is completely implausible.

24. What happens if there are multiple vendors?

As a declaration is vendor specific, where there are multiple vendors each vendor needs to provide a separate declaration.

13 Schedule 1, section 14-225(3) TAA

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CAN A VARIATION BE APPLIED FOR?

25. What is a variation application?

An application for variation can be made by a vendor, purchaser or creditor¹⁴ where the vendor is not entitled to a clearance certificate (eg because they are a foreign resident) but circumstances exist which means it may be appropriate for the ATO to vary the amount that is to be withheld, including in some circumstances by varying the amount to nil.

A foreign resident vendor can also apply for a variation in circumstances where a vendor declaration is not appropriate.

26. When can you apply for a variation?

The legal basis for the issuing of variations will ultimately be based on taxation law. Possible reasons for applying for a variation may include:

- a. a foreign resident not making a capital gain on the transaction (eg, they will make a capital loss or a CGT rollover relief applies);
- b. a foreign resident not otherwise having an income tax liability (eg, carried-forward capital losses or tax losses); or
- c. a scenario where there are multiple vendors, only one of which is a foreign resident.

Important note for practitioners: the LIV recommends that practitioners advise their clients to consider obtaining advice from an accredited tax specialist in order to determine whether they have a legal basis for applying for a variation and, if so, for what amount.

27. Who can apply for a variation?

Pursuant to Schedule 1, section 14-235(3) of the TAA, a vendor, purchaser or creditor can apply for a variation.

The name and entity type of the vendor is the entity that has the obligation to declare any capital gains that arise (if any) from the transaction. Where the asset is held on behalf of a trust or superannuation fund, then the entity that has legal title may not be the same as the entity which has the obligation to declare the capital gain.

The online form can be completed by authorised agents (eg tax agent, legal representative). At the time of publication of this guide, conveyancers who are not legal practitioners or tax agents cannot complete the form on behalf of the vendor. However, the vendor may provide a completed and signed paper form to their conveyancer to be keyed in electronically or to be sent (the paper form) to the ATO on the vendor's behalf.

28. How do you apply for a variation?

The variation application will be made via an online form. The LIV has been advised that the online form will be available on the ATO website www.ato.gov.au/FRCGW from 27 June 2016.

As with the clearance certificate application process, the online variation application form allows the applicant to upload any supporting documentation, although this is not compulsory. The ATO has indicated that the timeframe for processing variation applications will be within 28 days. A PDF version of the variation application will be on the ATO website at www.ato.gov.au/FRCGW from late May 2016 for contracts entered into from 1 July 2016 and settling in the first two weeks of July 2016. Otherwise, the ATO is encouraging vendors to use the online form from 27 June 2016.

29. What happens if the variation application is successful?

If successful, the ATO will issue a variation notice to the person nominated in the online application form. The notice confirms the amount to be withheld by the purchaser at settlement and if the variation is held by the vendor or the vendor's creditor, it should be provided to the purchaser well in advance of settlement. If the amount to be paid is nil, the purchaser effectively does not have an obligation to withhold.

30. How can I, as the purchaser's representative, check the validity of the variation notice provided to the purchaser?

The legislation does not require the purchaser to check the validity of the variation notice before acting upon it. However, the purchaser may call the ATO on 13 28 66 if they wish to confirm the validity of a variation notice. The ATO will verify the rate of withholding, notice number, applicable asset, expiry date and maximum sale price.

The ATO is currently investigating an electronic alternative which it hopes will be available for use from 1 July 2017. The LIV will keep members informed of any developments.

14 Schedule 1, section 14-235(3) TAA

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WHAT AMOUNT NEEDS TO BE WITHHELD?

31. How do you calculate the amount that is to be withheld?

Pursuant to Schedule 1, section 14-200 of the TAA, the amount to be paid to the Commissioner is “an amount equal to 10 percent of...the first element of the CGT asset’s cost base just after the acquisition.” If the acquisition is the result of exercising an option, this does not include any payment made and market value of any property given for the option (to renew or extend).¹⁵

Alternatively, if a variation notice has been issued following a variation application being made, the amount to be withheld will be an amount equal to the withholding rate specified on the variation notice applied against the first element of the CGT asset’s cost base just after the acquisition.

32. What does “first element of the cost base” mean?

Section 110-25 of the ITAA 1997 sets out the five elements that make up the cost base of a CGT asset. The first element of the cost base is:

- a. the total money which is paid, or required to be paid, in respect of acquiring an asset; and
- b. the market value of any other property which is given, or is required to be given, in respect of acquiring the asset (worked out as at the time of the acquisition).

In practical terms, the first element of the cost base will generally be the purchase price.

Important note for practitioners: the general rules about the cost base for CGT assets may be modified in certain situations under Division 112 of the ITAA 1997, such as in circumstances where parties are not dealing with one another at arm’s length.

The ATO provides further information regarding calculating the cost base at www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/What-is-the-cost-base/.

33. What does “market value” mean?

The ATO has indicated that the purchase price may be used as a proxy for market value if the purchase price was negotiated between a purchaser and vendor on an arm’s length basis. Where the parties are not dealing at arm’s length (eg related parties) the ATO has indicated it will not accept the purchase price as a proxy for market value and in such cases the purchaser will need to seek a separate expert evaluation. The ATO has a guide available on its website regarding the more commonly valued assets within the broader capital gains tax regime at www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Market-valuation-for-tax-purposes/.

Where a contract contains assets subject to FRCGW and not subject to FRCGW, the ATO has indicated the parties can decide to come to an agreement about the respective market values of each asset. More guidance on this issue can be found on the ATO website www.ato.gov.au/FRCGW.

34. When used as a proxy, is purchase price inclusive or exclusive of GST?

The gross purchase price (exclusive of GST) should be used only if the purchaser has registered for GST and can claim GST net input tax credits included in the cost of the asset. If the purchaser has not registered for GST, then the purchase price should be inclusive of GST. An exception applies to margin schemes in which case the purchase price is inclusive of GST.

35. What happens when the purchase price is adjusted at settlement?

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 (eg for council rates, water and sewer charges and strata levies). Therefore, the \$2 million threshold test should be applied to the purchase price before adjustment for disbursements.

36. What happens if the market value is uncertain or you are unsure of the purchase price?

Ultimately, where applicable, FRCGW imposes a strict liability on the purchaser to withhold the relevant amount of tax from settlement and pay it to the Commissioner. If there is doubt as to whether the FRCGW is triggered (eg dispute about whether the market value of the interest is \$2 million or more), the purchaser may form the view that they will withhold in order to avoid penalties being imposed by the ATO. However, the purchaser will be liable to the vendor and in default under the contract if the purchaser withholds when not entitled to do so.

In such circumstances, it would be prudent to obtain advice from an accredited tax law specialist.

The Commissioner has the discretion to refund an amount paid if that amount has been paid in error.¹⁶

37. What happens when there are multiple vendors?

Where one (but not all) of the vendors provides a clearance certificate or vendor declaration, the withholding obligation still applies and the amount of withholding is on the entire first element of the cost base of the asset, not just the foreign resident's portion. However, the ATO has publicly indicated that it will not require vendors to apply for variations in these situations and will allow a purchaser (subject to any existing variation) to withhold the amount in accordance with the foreign resident vendor's proportional interest in the purchase price. This is an administrative approach adopted by the ATO as at the date of publication of this guide. Practitioners should refer to the ATO website for latest developments www.ato.gov.au/FRCGW.

15 Schedule 1, section 14-200(3)(a)(ii) of the TAA

16 Schedule 1, section 18-70 of the TAA

7 HOW IS PAYMENT MADE?

38. How can the purchaser effect payment of the withholding amount?

Payment can be made either electronically (EFT) to the ATO, by a cheque that is addressed to the “Deputy Commissioner of Taxation” and mailed to the ATO or in person at an Australia Post outlet. If paying in person or by cheque, you need to ensure that the payment is actually received by the ATO before the required deadline to avoid penalties or general interest charges being imposed upon the purchaser by the ATO. The ATO will allow a short grace period of time before imposing general interest charges, however the ATO has not provided an indication of the specific timeframe to be allowed.

To make the payment, the purchaser will need a payment reference number and/or the payment slip and barcode. These are provided automatically once the purchaser or their representative submits the Purchaser Payment Notification Form online to the ATO.

39. When does the payment have to be made?

Payment must be made on or before the day the purchaser becomes the owner of the relevant CGT asset.¹⁷ As discussed above, if payment is not made by the deadline, the ATO may impose penalties or interest. The ATO may allow a short period of time before imposing these, but no specific timeframe has been provided, as at the time of publication of this guide.

40. When do you complete the online Purchaser Payment Notification Form?

Once the purchaser is aware that a payment is required to be made, the purchaser (or its representative) must complete the online Purchaser Payment Notification Form. This is required before any withholding payment can be made.

41. What happens after the online Purchaser Payment Notification Form has been lodged?

Once submitted, the ATO will issue on the screen for the purchaser a Payment Reference Number and a PDF icon they can click on to obtain a downloaded payment slip and barcode. A separate Payment Reference Number and payment slip/barcode will be provided for each purchaser listed on a Purchaser Payment Notification Form.

The Payment Reference Number will need to be quoted by the purchaser when they effect payment of the withholding amount to the ATO. The payment slip/barcode is used if payment is made in person at an Australia Post outlet.

42. How do I prove that payment was made?

If payment is made electronically to the ATO, a receipt will be provided at the time of payment.

If payment is made at an Australia Post outlet, then the post office receipt is sufficient proof of payment.

If the payment is mailed to the ATO, the purchaser must wait until they have received a receipt for the payment from the ATO to confirm the payment.

Regardless of the form of payment, the ATO will issue a payment confirmation to the purchaser and vendor once they have received the payment.

43. When does the vendor receive a tax credit for the withheld amount?

The foreign resident vendor only receives their tax credit for the withheld amount when:

- a. the withheld amount is paid to and received by the Commissioner; and
- b. the vendor lodges an Australian income tax return. It should be noted that the tax payable by the vendor may differ from the amount withheld as they involve different calculations.

44. What happens if payment is not made?

Purchaser

If payment is not received by the ATO within the grace period, then the ATO will impose general interest charges from the date of settlement and commence recovery against the purchaser. The ATO can impose a penalty on the purchaser that is equal to the withholding.¹⁸

Pursuant to Schedule 1, section 18-125 of the TAA, directors of a corporate purchaser may be personally liable if the relevant company fails to remit the withholding amount.

Purchaser's Representatives

The purchaser's representative needs to properly advise the purchaser about their obligation to the ATO to withhold. While the legal obligation to make payment sits directly with the purchaser, it is foreseeable that the purchaser could take action against their legal representative if this advice is not provided.

Vendor

If the withholding amount is not paid, then the vendor will not receive any tax credit for that amount. As the liability is from the purchaser to the ATO, it is the ATO and not the vendor who has standing to pursue recovery of the amount from the purchaser. Under the LIV Special Condition 1B in its Contract of Sale of Real Estate, the purchaser is responsible for any penalties or interest payable to the Commissioner on account of late payment.

45. Can the vendor pay the withholding amount to the ATO and complete the Purchaser Payment Notification Form or otherwise notify the ATO that settlement has occurred?

Only the purchaser or their representative is able to complete and submit the Purchaser Payment Notification Form which provides the payment reference number required to be quoted at the time of payment.

Further, the purchaser has the liability to the ATO to withhold payment. Risks could potentially arise for the purchaser if they rely on the vendor to effect payment.

46. What if there are multiple purchasers?

Multiple purchasers should ideally complete one combined Purchaser Payment Notification Form. The ATO will provide multiple payment reference numbers and payment slips/ barcodes even when one form is submitted for multiple purchasers.

However, if the different purchasers have different legal representatives, it is also acceptable to complete separate payment notifications forms.

Where there are multiple purchasers listed on the one form, the percentage ownership of each purchaser will need to be included in the online form. If no percentage is specified, the ATO will assume an equal ratio of ownership for each purchaser listed.

More Information

ATO

The ATO has provided additional information on their website which can be accessed at www.ato.gov.au/FRCGW. A Commonly Asked Questions and fact sheet for real estate agents can also be found on their website.

The ATO has advised it is developing, in consultation with the LIV and other law societies, a Law Companion Guideline to provide guidance on this measure that is tailored to the needs of the legal profession.

LIV

The LIV has formed a cross-sectional working group to consult and advise in relation to this measure.

We are very interested to hear from you about any questions or concerns you have regarding these changes. Please email FRCGW@liv.asn.au at first instance and a member of our working group will be in contact.

If you would like to be kept informed of further education opportunities please contact FRCGW@liv.asn.au or visit the LIV website at www.liv.asn.au/LIV-Home/Professional-Development/whatsOn-Calendar.

The Foreign Resident Withholding Tax Forum on 10 June 2016 will feature experts from the ATO and multiple practice areas discussing the changes and what they mean for lawyers.

The LIV will continue to keep members informed of practice updates, legislative changes and educational opportunities regarding these changes through LawNews, our daily news bulletin.

17 Schedule 1, section 14-200(2) of the TAA

18 Offence: Schedule 1, section 16-25 of the TAA; Administrative penalty: Schedule 1, section 16-30 of the TAA.



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