3 May 2016

The Hon Kelly O'Dwyer MP
Assistant Treasurer and Minister for Small Business
Parliament House
Canberra ACT 2600

By email: msbatcorro@treasury.gov.au

Dear Assistant Treasurer

Foreign resident capital gains tax withholding payments

We refer to the *Tax and Superannuation Laws Amendment (2015 Measures No 6) Act 2015* (the Act) which applies to contracts made on or after 1 July 2016. The Act introduces a new foreign resident tax withholding payment regime (tax measure).

The Law Council of Australia, together with the Law Society of New South Wales and the Law Institute of Victoria, do not oppose the overall objective of the regime, which is to ensure the payment of capital gains tax by foreign residents. However, the tax measure will have a broad impact across legal practice and the wider business community. The initiative will generate uncertainty, delays and a significant administrative burden for Australians who purchase Australian property from foreign interests and Australians who purchase real estate with a market value of $2 million or more.

We request that the application of the tax measure to new contracts be deferred to 1 July 2017 or, alternatively, a staged commencement to allow time to:

- clarify how parties can comply with the new requirements;
- educate all relevant sectors to ensure compliance, including the legal profession, financial institutions, conveyancers and real estate agents;
- amend relevant transactional documents to facilitate compliance with the new requirements; and
- enable variations to be issued for specific classes of conveyancing transactions to reduce the red-tape, administrative delays and costs that our respective members anticipate will otherwise be caused if variations are required to be issued on a discretionary case by case basis.

Concerns expressed on previous occasions

These concerns have been raised previously in the course of the development of the tax measure. For example:

- The Law Council of Australia's Business Law Section advised the Treasury in December 2014 and August 2015 that:

- the tax measure needed to be workable, readily able to be complied with and not unnecessarily disruptive of the commercial timetable for acquisitions and disposals involving Australian assets.

- a wide range of standard transactional and commercial documentation had to be updated for compliance purposes, and that commencement of the measure should be postponed until 1 July 2017; and

- the public, the legal profession, accountants and allied professionals needed to be made aware of the tax measure and its application.

- The Law Society of NSW also made a submission to Treasury in August 2015 that highlighted several issues with the practical operation of the measure, and similarly requested that the commencement of the measure be postponed until 1 July 2017.

We acknowledge the government has considered these concerns and decided to proceed with the tax measure. Accordingly, our concerns are now directed toward the implementation timeframe, which we consider to be wholly inadequate and likely to have unintended consequences for Australian residents.

Potential impact if transition period not extended

If necessary changes are not made and the commencement date remains 1 July 2016, the proposed regime may lead to:

- increased compliance costs for purchasers, including Australian residents. Of particular concern are the compliance costs in completing the application form for a clearance certificate, purchaser payment notification form and the application form for a variation, with limited time to familiarise themselves with the process and requirements;
- purchasers bearing additional unexpected and unrecoverable transaction costs in performing a tax collection function on behalf of the Australian Taxation Office;
- uncertainty and reduced consumer confidence in the property market. The regime is likely to have an impact on the lending profile of affected vendors and may lead to difficulties if the vendor is seeking to apply the sale proceeds in another transaction;
- increased administrative costs and delayed settlements. Timeframes for settlement may be delayed to allow time for the parties to obtain the necessary clearance certificates, variations or declarations and for the purchaser to establish suitable payment options prior to settlement; and
- increased risk exposure for purchasers (and their advisors) if the complex requirements under the regime are misunderstood, or inadvertently breached, with substantial penalties for non-compliance.

Measures which might address these concerns

We suggest that these potential consequences could be ameliorated by either extending the implementation date or introducing transitional arrangements. In addition to these, the following government initiatives may assist in promoting compliance with the new tax measure and reducing unnecessary compliance costs.

Stakeholder education

To ensure compliance with the new measure, an extensive education campaign is necessary not only for the legal profession but also for members of the wider business community and Australian consumers.

We consider this tax measure will be highly complex to implement and its application will differ depending on the nature of the transaction. For example, different issues will arise in relation to family law transactions, which are not at arms-length and where the residency status of the vendor is in dispute and/or susceptible to change.

Class variations

Under sub-section 14-235(5) of the Act, the Commissioner may by legislative instrument vary classes of amounts payable to the Commissioner. We suggest that variations for specific classes of conveyancing transactions be issued to reduce administrative delays and costs that our respective members anticipate will otherwise be caused if variations are required to be issued only on a discretionary, case-by-case basis, particularly for classes of transactions that would ordinarily be exempt from capital gains tax, including:

- transactions attracting roll-over relief;
- transactions required to give effect to orders made by a Court;
- all or some transactions which are disregarded for capital gains tax purposes (e.g. main residences, transfers relating to family law matters etc.); and
- transactions where a secured creditor has an interest in the subject property and where all of the proceeds of sale are required to extinguish the vendor's liability to the secured creditor.

We further recommend that the ATO consult with the legal profession and other stakeholders to clarify the practical operation of any class variations, such as evidentiary requirements to be obtained by the transferee. For example, if the transfer of land occurs to give effect to orders made by a Court, is it sufficient for the transferee to be provided with a copy of the Court order to relieve the transferee from the obligation to withhold?

Option Agreements

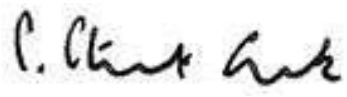
We are concerned that the regime will apply to all option agreements at the point in time when an option is granted, even where the option fee is minimal. Option agreements are not subject to the $2 million exemption, nor the clearance certificate mechanism. Unless the grantor can make the required residency declaration, any option agreement granted by a foreign tax resident appears to be subject to the measure and 10 per cent must therefore be withheld.

When the option fee is quite low, the cost of complying with the regime may be onerous, given the relatively small amount that will be collected. This may be, in many circumstances, inconsistent with the government's objectives of reducing unnecessary costs and regulatory burdens on business. Accordingly, we request consideration be given to an exemption for option agreements with low option fees payable noting that the withholding will apply if the option is actually exercised.

The Law Council, the Law Society of NSW and the Law Institute of Victoria are currently working with the ATO to clarify a broad range of issues. We hope that ongoing consultation continues into the future, as implementation issues are likely to arise after 1 July 2016, which will require swift resolution.

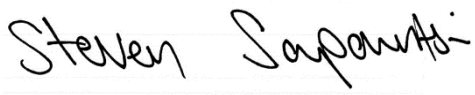
We would be pleased to meet with you to discuss these concerns and suggest any queries be directed to Nick Parmeter (Law Council Director of Policy), in the first instance, on (02) 6246 3732 or nick.parmeter@lawcouncil.asn.au.

Yours sincerely,



S. Stuart Clark

President, Law Council of Australia



Steven Sapountsis

President, Law Institute of Victoria

Gary Ulman

President, Law Society of NSW

cc: Commissioner of Taxation, Chris Jordan AO.