

Changes to the Foreign Resident Capital Gains Withholding Tax – do you need a Clearance Certificate?

By Gus Irdi, IRDI Legal (July 2017)

A lower threshold now applies to transactions subject to foreign resident capital gains withholding tax. The new threshold means many routine property transactions involving Australian residents can be affected.

These changes are designed to enable the Australian Taxation Office (ATO) to capture more property transactions. They come as the Federal Government seeks to clamp down on foreign residents not paying capital gains tax, thereby reducing pressure on housing affordability for Australian residents.

Background

Where a foreign resident disposes of Australian real estate, they are subject to a withholding tax. Previously, the relevant legislation required the buyer to withhold and pay to the ATO 10% of the purchase price where the purchase price was \$2 million or more.

Key changes

The recent changes mean for agreements signed from 1 July 2017:

- 1 The purchase price threshold has been reduced to \$750,000; and
- 2 The withholding tax rate is now 12.5%.

The withholding obligation applies to all sellers of properties over the \$750,000 threshold. Australian resident vendors will need to provide a Clearance Certificate issued by the ATO to a purchaser at settlement in order to avoid the purchaser withholding 12.5% of the purchase price.

The previous \$2 million threshold and 10% rate will still apply to any contracts entered into before 1 July 2017 notwithstanding they are not due to settle until after 1 July 2017.

Options for Australian resident vendors

Vendors may either complete and lodge the application form themselves, or have it completed and lodged on their behalf by a third party. Clearance Certificates are specific to a particular entity, and are valid for 12 months. They can also apply to multiple transactions over their 12 month lifespan, which will be particularly advantageous to property developers.

Recommendations for the future

Clearance Certificates are now a vital part of the pre-settlement procedure. We recommend applying for a Clearance Certificate early in the process of sale (ideally when first contemplating a sale) in order to mitigate the risk of funds being withheld from sale proceeds, as well as avoiding unnecessary settlement delay. Without this Clearance Certificate vendors will face the risk of being unable to access 12.5% of their sale proceeds.

For useful information and resources visit the ATO website at <https://www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding--Impacts-on-foreign-and-Australian-residents/>

How can I find out more?

At IRDI Legal, our experienced and specialised **Property team** can assist you with any property and contractual questions. Please contact Gus Irdi to find out more.