



Capital gains withholding: Impacts on foreign and Australian residents

- <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/>
- Last modified: 23 Apr 2019
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Capital gains withholding: Impacts on foreign and Australian residents

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

The FRCGW tax rate is 12.5%.

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

For 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, the FRCGW withholding tax rate is 10% and applies to real property disposals where the contract price is \$2 million and above.

Find out about:

- [Background](#)
- [Asset types](#)
- [Vendor](#)
- [Clearance certificates](#)
- [Vendor declarations](#)
- [Variations](#)
- [Calculating the withholding](#)
- [Goods and services tax](#)
- [Leases](#)
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- [Foreign resident capital gains withholding and the tax return](#)

Background

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

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

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

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

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

- for Australian real property, a [clearance certificate](#) obtained from us
 - Australian resident vendors selling real property will need to obtain a clearance certificate from us prior to settlement, to ensure they don't incur the 12.5% non-final withholding
- for other asset types, a [vendor declaration](#)
 - the vendor may provide the purchaser with a vendor's declaration to specify withholding isn't required on the acquisition of the asset.

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

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

When the rules apply

- An entity (the purchaser) becomes the owner of a [capital gains tax](#) (CGT) asset as a result of acquiring it from a vendor (or vendors) under one or more transactions.
- At least one of those vendors is a [relevant foreign resident](#) at the time at least one of the transactions is entered into.
- The CGT asset is a certain type of Australian property or an [option or right](#) to

acquire such property.

- The purchaser acquires the CGT asset under a contract entered into on or after 1 July 2016.
- There are no [exceptions](#).

While the objective of the rules is to assist in the collection of foreign residents' CGT liabilities, the withholding tax will apply regardless of whether the vendor's gain on the sale of the asset is subject to tax under the CGT regime or as ordinary income.

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

Find out about:

- [Online forms and instructions](#)
- [Asset types](#)
- [Vendor](#)
- [Clearance certificates](#)
- [Vendor declarations](#)
- [Variations](#)
- [Calculating the withholding](#)
- [Paying the withholding](#)
- [Foreign resident capital gains withholding and the income tax return](#)
- [Legislation and other supporting materials](#)

Online forms and instructions

- <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/?page=2>
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- [Clearance certificate application for Australian residents](#)[□]
- [Capital gains withholding clearance certificate application online form and instructions – for Australian residents](#)
- [Variation application for foreign residents and other parties](#)[□]
- [Foreign resident capital gains withholding rate variation application online form and instructions](#)
- [Purchaser payment notification](#)[□]
- [Foreign resident capital gains withholding purchaser payment notification online form and instructions](#)

Find out about:

- [Asset types](#)
- [Vendor](#)

- [Clearance certificates](#)
- [Vendor declarations](#)

Asset types

- <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/?page=3>
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The legislation applies to the following asset types:

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

Market value

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

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

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

disbursements.

Find out about:

- [Goods and services tax](#)

Excluded assets

Some assets are not subject to the withholding, including:

- taxable Australian real property with a market value of less than \$750,000
- an indirect Australian real property interest providing a company title interest with a market value of less than \$750,000
- transactions conducted through an approved stock exchange
- transactions conducted using a broker-operated crossing system, such as a 'dark pool', as described in the ASIC Market Integrity Rules (ASX Market) 2010
- transactions subject to another withholding obligation
- securities lending arrangements, as these don't trigger a CGT liability for the vendor and therefore no payment obligation is imposed
- transactions where the vendor is in external administration or transactions arising from the administration of a bankrupt estate, a composition or scheme of arrangement, a debt agreement, a personal insolvency agreement, or same or similar circumstances under a foreign law.

Find out about:

- [Situations involving mortgagors and mortgagees](#)
- [Exceptions](#)

Exceptions

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

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

Vendor

- <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/?page=4>
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The vendor is the entity that holds the legal title to the asset this withholding applies to.

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

When the vendor is treated as a foreign resident

A vendor is treated as a foreign resident if:

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

Knowledge condition

The knowledge condition is only relevant to purchases of indirect Australian real property interests (other than company title interests) and options and rights to acquire taxable Australian real property or indirect Australian real property interests.

The knowledge condition will be satisfied where the purchaser either:

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

Evidence for the knowledge condition

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

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

Purchasers who are not comfortable determining whether the knowledge condition

is satisfied, may seek a vendor declaration confirming the vendor is not a relevant foreign resident.

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

Clearance certificates

- <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/?page=5>
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A clearance certificate provides certainty to purchasers regarding their withholding obligations. It confirms the withholding tax is not applicable to the transaction.

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

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

Find out about:

- [How long it takes](#)

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

Without being presented with a valid clearance certificate, the purchaser will be required to remit 12.5% of the purchase price to us if no other [exclusions](#) apply.

How to apply

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

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

Australian residents 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
- +61 2 6216 1111 outside Australia to obtain details of what you need to provide.

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

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

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

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

Next step:

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

See also:

- [Work out your residency status for tax purposes](#)

*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 show the purchaser a clearance certificate to ensure amounts are not withheld.

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

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

When to obtain a clearance certificate

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

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

How long it takes

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

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

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

Where we send the certificate

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

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

Valid clearance certificate

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

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

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

What name should be on the clearance certificate

Vendors must ensure the details on their clearance certificate application are

accurate, so the clearance certificate issues in the correct name as that shown on the Certificate of Title of the property.

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

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

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

- we accept the purchaser has fulfilled their obligation if the vendor supplies the purchaser clearance certificate and proof of a name change (for example, a marriage certificate issued from an Australian state or territory registry)
- we accept 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
- a correct address on a certificate is not required to fulfil the purchaser's obligations
- it is not necessary to have the instrument number to a title deed on the clearance certificate – for example 'Trustee under instrument ###'
- it is not necessary to have the details of the trust on the clearance certificate – for example 'as Trustee for the XYZ Trust'. See [Trusts and superannuation funds](#) for further clarification
- it is not necessary to have 'as executor for' or 'as legal representative for' on a clearance certificate to fulfil the purchasers obligations (where purchasing from a deceased estate). See [Deceased estates](#) for further clarification.

Note: We will not reissue certificates in the above instances.

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

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

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

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

- BET number (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 capital gains withholding clearance certificate application](#) provide specific details about how the form should be completed.

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

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

Note: If a corporate trustee does not have a TFN, include an attachment in the application which provides the details of the relevant trust.

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

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

Consolidated groups and multiple entry groups

Withholding and intra-group transactions

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

Entity obtaining the clearance certificate

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

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

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

The contract is for longer than 12 months

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

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

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

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

Estimated market value \$750,000 or above

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

Selling property with multiple titles

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

Example

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

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

When we withdraw a clearance certificate once it has been issued

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

This is to ensure that the vendor is not able to use the clearance certificate where

we determine they have no entitlement to it.

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

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

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

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

When the vendor provides a fraudulent clearance certificate

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

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

Deceased estates

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

- a beneficiary acquires ownership of the relevant asset under the deceased individual's will, by operation of an intestacy law etc
- a beneficiary acquires ownership of the relevant asset from the legal personal representative (executor/trustee) of the deceased individual in a manner not described above
- the property devolves to the legal personal representative (executor/trustee) following the death of the individual
- a surviving joint tenant acquires the deceased joint tenant's interest in a CGT asset.

See also:

- [PAYG Withholding variation for foreign resident capital gains withholding payments – deceased estates and legal personal representatives](#)²⁷ – the operation of the Instrument extends to circumstances where assets pass to beneficiaries of a testamentary trust.

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

assets to a third party.

Situations involving mortgagors and mortgagees

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

There are three situations where this commonly applies:

- Situation 1 – the mortgagor retains title to the sale as the mortgagee has not repossessed the title to the property but has ordered its sale.
- Situation 2 – where the mortgagee does take possession of the property and sells in that capacity, but there is no transfer of title from mortgagor to mortgagee.
- Situation 3 – the mortgagee has repossessed and taken title to the property from the mortgagor. This is commonly known as a foreclosure. In this situation there are two transactions where foreign resident capital gains withholding may apply
 - the transaction concerning the transfer of title from the mortgagor to the mortgagee (generally deemed to be a sale of the property at market value)
 - the transaction concerning the transfer of title from the mortgagee to the ultimate purchaser.

Applying for the clearance certificate or vendor variation

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

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

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

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

There is no specific requirement as to who physically provides the clearance certificate to the purchaser. Therefore, with both situation 1 and 2, if the mortgagor, as vendor, obtains the clearance certificate, then provides it to the mortgagee, and the mortgagee provides it to the purchaser the ultimate purchaser can verify that the

clearance certificate issued to the vendor is valid so long as it matches the name on the certificate of title.

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

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

When the purchaser should withhold

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

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

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

For situation 3, both transactions have to be considered:

- repossession by the mortgagee from the mortgagor – foreign resident capital gains withholding applies to this transaction with the mortgagee (creditor) having to withhold the 12.5% foreign resident capital gains withholding unless either the mortgagor, as vendor, or the mortgagee, as creditor, have applied and been granted a foreign resident capital gains withholding variation.
- sale of the property by the mortgagee to the ultimate purchaser – foreign resident capital gains withholding would apply. Therefore, unless the mortgagee has obtained a foreign resident capital gains withholding variation, the ultimate purchaser is required to withhold at a rate of 12.5%.

Exceptions

There may be a situation where the mortgagee's name is not on the title as registered proprietor (although the mortgage will be listed as an interest on that

title). This is because the mortgagee has not repossessed the property. However, the contract of sale will show the vendor as a mortgagee in possession exercising a power of sale under the mortgage.

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

The company is insolvent or under external administration

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

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

On sale of property with no immediate transfer of title

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

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

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

Relationship breakdown

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

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

See also:

- [PAYG Withholding variation for foreign resident capital gains withholding payments – marriage or relationship breakdowns](#)[☞]

Income tax exempt entities

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

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

See also:

- [PAYG Withholding variation for foreign resident capital gains withholding payments – income tax exempt entities](#)[☞]

Government authorities and not-for-profit organisations

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

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

Vendor declarations

- <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/?page=6>
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For all other asset types subject to foreign resident capital gains withholding, the vendor may provide the purchaser with a vendor's declaration to specify withholding isn't required on the acquisition of the asset. There are two types of vendor declarations:

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

Trusts and superannuation funds

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

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

Residency declaration for transactions that are not real property

Where the purchaser believes the vendor 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 stating they are an Australian tax resident, the purchaser will not treat them as a foreign resident.

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

Purchaser can rely on the declaration

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

Not an indirect Australian real property interest declaration

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

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

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

Purchaser can rely on the declaration

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

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

Interests on the stock market

Where a vendor is disposing of the interest in the Australian entity on an approved stock exchange (such as the ASX or Chi-X), there is no need for the declaration to

be provided. This is because interests disposed of on an approved stock exchange are an 'excluded asset' for the purposes of this withholding.

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

When the vendor doesn't supply a declaration when requested

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

Valid declaration from a vendor

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

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

For the purchaser to rely on the declaration, the:

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

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

How to declare

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

Next step:

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

Multiple vendors

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

Declarations and the disposal of real property

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

False vendor declarations

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

A purchaser will be treated as knowing a vendor declaration is false where they have specific knowledge of this fact. A purchaser will have such knowledge when they are a party to the fraud committed by the vendor, or when they have other information that indicates the declaration is implausible. The fact the purchaser may have reasonable grounds to doubt the accuracy of the declaration 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
- 40 penalty units where the declaration is false or misleading as a result of the vendor failing to take reasonable care.

Variations

- <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/?page=7>
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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.

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

On 11 April 2019, the Australian Government assumed a caretaker role, with an election to be held on 18 May 2019. The continuation of this measure will be a matter for the incoming government to decide.

Foreign residents may no longer be able to claim the CGT main residence exemption as the reason for their variation. This change is not yet law and is subject to parliamentary process.

In the 2017-18 Budget, the government announced that the main residence exemption will not be available to foreign resident vendors in the following circumstances:

- For property held before 7:30pm (AEST) on 9 May 2017, the exemption will only be able to be claimed for disposals that happen up until 30 June 2019 and only if they meet the requirements for the exemption. For disposals that happen from 1 July 2019 they will no longer be entitled to the exemption
- For property acquired at or after 7:30pm (AEST) 9 May 2017, the exemption will no longer apply to disposals from that date.

If the law is passed, this change will only apply if the person is not an Australian resident at the time of the disposal (the contract date). Their residency status in earlier income years will not be relevant. There will be no partial main residence exemption available in these circumstances.

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

Legislative Instruments

We have issued a class variation for:

- [deceased estates and legal personal representatives](#)^[2]
- [income tax exempt entities](#)^[2]
- [marriage or relationship breakdowns](#)^[2].

See also:

- [Your main residence](#)
- [Foreign residents and main residence exemption](#)

How to apply

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

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

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

Next step:

- Complete the [Foreign resident capital gains withholding rate variation paper application](#)

See also:

- [LCR 2016/5 Foreign resident capital gains withholding regime: the Commissioner's variation power](#)

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

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

Calculating the reduced rate of withholding

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

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

Unit price fluctuations

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

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

attachment to the variation application.

Multiple vendors

A variation notice applies to the specified vendor and applicable asset on the notice. If an asset is acquired from multiple vendors, each vendor will need to supply the purchasers with 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

- <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/?page=8>
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Purchase price vs market value

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

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

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

Purchase price vs first element of the cost base

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

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

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

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

Multiple properties in one transaction

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

No additional payment on top of the agreed purchase price

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

The withholding amount is taken from the purchase price the purchaser has agreed

to pay the vendor.

How withholding applies to deposits or instalments

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

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

When the contract doesn't settle

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

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

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

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

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

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

Example

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

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

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

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

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

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

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

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

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

See also:

- [PAYG Withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple entities](#)²⁷

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 be the withholding rate as specified on the variation notice issued by us to that particular foreign resident vendor. It may be the purchaser has to withhold 8% from one vendor, and 3% from another vendor.

When the purchaser fails to withhold

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

Goods and services tax

- <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/?page=9>
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For some transactions, it may be necessary to determine if the purchase price needs to be adjusted for GST in determining the price on which the withholding is applied.

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

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

The 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

- <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/?page=10>
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Acquisition of a lease

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

Withhold amount if paying a premium for the lease

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

Rent and outgoings

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

Options

- <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/?page=11>
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The acquisition of an option to acquire an asset subject to this withholding measure from a foreign resident would be subject to the 12.5% withholding unless the vendor provides the purchaser with a valid [declaration](#) or another [exception](#) or [exclusion](#) applies. However, where the market value of the option being acquired is less than \$8 no withholding applies and no Purchaser payment notification form is required to be submitted by the purchaser.

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

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

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

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

Where the option is exercised on or after 1 July 2016 and the asset being acquired is a CGT asset subject to the withholding rules, then the withholding provisions do

apply to the first element of the cost base of that relevant asset (we accept this is the purchase price of the asset where there is an arm's length transaction). This is the case even when the option was granted prior to 1 July 2016 or where the option contract doesn't consider foreign resident capital gains withholding.

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

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

Earnouts

- <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/?page=12>
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How the rules apply will depend on whether the earnout right is one of the following.

Look-through standard earnout rights

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

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

Non-look-through standard earnout right

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

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

Look-through reverse earnout right

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

Non-look-through reverse earnout right

The purchaser is required to withhold and pay to the Commissioner 12.5% of the first element of the CGT asset's cost base. However, the purchaser has acquired more than one asset. The non-look-through earnout right is a separate CGT asset acquired by the purchaser and not subject to the withholding. Therefore, the first element of the cost base of the CGT asset that is subject to withholding is the amount of the purchase price that is reasonably attributable to that CGT asset.

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

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

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

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

Share issues / IPOs

- <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/?page=13>
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The withholding obligation doesn't apply if the purchaser acquires shares as a result of being issued or allotted those shares through an Initial Public Offer (IPO) because the shares will not be indirect Australian real property interests.

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

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

An option to acquire shares

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

Paying the withholding

- <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/?page=14>
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A purchaser must pay us the withholding equal to 12.5% of the first element of the CGT asset's cost base (the cost base is generally equal to the purchase price). Where no money is paid or required to be paid, or the agreed amount is under market value, then the 12.5% withholding is on the market value of the CGT asset.

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

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

When the payment is required

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

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

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

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

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

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

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

There is a short grace period from, and including the day of settlement, for the withholding to be paid in full. General interest charges will accrue from the date of settlement if we don't receive the withholding within the grace period.

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

Purchaser payment notification form

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

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

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

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

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

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

How to pay

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

1. Transfer the amount via electronic funds transfer (or BPAY®)
 - Bank: Reserve Bank of Australia
 - BSB: 093 003
 - Account number: 316 385
 - Account name: ATO direct credit account
 - Reference: Your payment reference number
2. In person at Australia Post

- the purchaser will need the barcode supplied to them after lodgment of the Foreign resident capital gains withholding purchaser payment notification. The post office accepts cheques up to \$100 million.
3. Mail a cheque to us with the PRN (Note: Large withholders may pay the subdivision 14-D withholding amount by non-electronic means)
- Australian Taxation Office
Locked Bag 1936
ALBURY NSW 1936
Australia

After payment has been made

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

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

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

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

How to pay when travelling

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

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

- [Foreign resident capital gains withholding purchaser payment notification paper form instructions](#)

Compulsory acquisitions by government authorities

Certain Australian government authorities can exercise powers under State and Territory legislation for the compulsory acquisition of real property. Generally the property is acquired, and ownership of the property passes, on the date that the acquisition is published in the relevant government gazette.

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

Payment of withholding tax

Under section 14-200 of Schedule 1 to the *Tax Administration Act 1953*, the

Australian government authority is required to pay the foreign resident capital gains withholding tax on or before the date that the authority became the property's owner.

Deferral of payment

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

Notice

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

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

- Acquisition of Land Act 1967 (Queensland)
- Land Acquisition (Just Terms Compensation) Act 1991 (New South Wales)
- Land Acquisition Act 1969 (South Australia)
- The Land Acquisition and Compensation Act 1986 (Victoria)
- Land Acquisition Act 1993 (Tasmania)
- Land Administration Act 1997 (Western Australia)
- Land Acquisition Act 1994 (Australian Capital Territory)
- Land Acquisition Act 1978 (Northern Territory)
- Land Acquisition Act 1989 (Commonwealth of Australia).

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

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

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

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

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

As a compensation amount could include a value for disturbance and professional expenses or other assets other than the property, the government authority would

need to establish a market value break-up of the payment related to the property, and only withholding on that amount.

Penalties

- <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/?page=15>
- Last modified: 23 Apr 2019
- QC 48972

A purchaser that fails to withhold as required and pay it to us may be subject to a penalty equal to:

- \$1,800 for contracts entered into on or after 1 July 2016 but before 1 July 2017
- \$2,100 for contracts entered into on or after 1 July 2017
- the amount they failed to withhold.

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

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

Foreign resident capital gains withholding and the tax return

- <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/?page=16>
- Last modified: 23 Apr 2019
- QC 48972

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
- whether the vendor will claim a credit for any withholding amount taken from their sale proceeds (for example, because they didn't provide the purchaser with a clearance certificate).

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

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

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

Applying the credit

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

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

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

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

See also:

- [Taxation Administration \(Remedial Power – Foreign Resident Capital Gains Withholding\) Determination 2017](#)²⁷

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

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

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

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

Amendments

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

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

More information

- <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/?page=17>
- Last modified: 23 Apr 2019
- QC 48972

Law companion rulings

The following rulings describe how we apply the law:

- [Foreign resident capital gains withholding regime: the Commissioner's variation power](#)
- [Foreign resident capital gains withholding regime: amount payable to the Commissioner](#)
- [Foreign resident capital gains withholding regime: options](#)

Legislation and supporting materials

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

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

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

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

Legislative instruments

- Acquisitions from multiple entities – Federal Registrar of Legislation page [PAYG Withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple entities](#)[□]
- Deceased estates and legal personal representatives – Federal Registrar of

Legislation page [PAYG Withholding variation for foreign resident capital gains withholding payments – deceased estates and legal personal representatives](#) [Ⓔ]

- Marriage or relationship breakdowns – Federal Registrar of Legislation page [PAYG Withholding variation for foreign resident capital gains withholding payments – marriage or relationship breakdowns](#) [Ⓔ]
- Exempt entities – Federal Registrar of Legislation page [PAYG Withholding variation for foreign resident capital gains withholding payments – income tax exempt entities](#)

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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