



FOREIGN RESIDENTS CAPITAL GAINS WITHHOLDING PAYMENT

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New rules will apply to vendors disposing of certain taxable Australian property under contracts entered into from 1 July 2016. A 10% withholding tax will be incurred on these transactions at settlement.

Australian resident vendors selling real property will need to obtain a clearance certificate from the ATO prior to settlement to ensure they do not incur the 10% withholding tax. Purchasers must pay the amount withheld at settlement to the Commissioner of Taxation.

This new withholding legislation is to assist in the collection of foreign residents' Australian tax liabilities.

The legislation imposes an obligation on purchasers to withhold 10% of the purchase price and pay it to the ATO where a vendor enters a contract after 1 July 2016 and disposes of certain asset types.

It is important to note that the following asset types are captured by this legislation:

- all real property in Australia;
- mining, quarrying or prospecting rights where the material is situated in Australia;
- lease premiums paid for the grant of a lease over real property in Australia;
- interests in Australian entities whose majority of

assets consist of the above asset types. These are called indirect assets;

- options or rights to acquire any of the above.

It should be noted that options entered into before 1 July 2016 but exercised after 1 July 2016 will attract the new legislation.

There are exclusions, mainly, that the 10% withholding tax will **NOT** apply to real property transactions with a market value of less than \$2,000,000.

If the transaction is at arm's length, the purchase price will be used in determining the market value of the property. If the transaction is not at arm's length a valuation will usually be required.

Australian resident vendors can avoid the 10% withholding tax by providing to the purchaser prior to settlement:

- a clearance certificate from the ATO (for Australian real property); or
- in respect of indirect assets only, a declaration by the vendor that they are not a foreign resident.

The clearance certificate confirms that the withholding tax is not applicable to the transaction. Where a valid clearance certificate is provided, the purchaser is not

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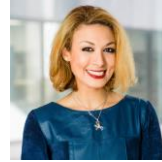
required to withhold an amount from the purchase price for the vendor listed in the clearance certificate. If the vendor fails to provide the clearance certificate by settlement, the purchaser is required to withhold 10% of the purchase price.

Where a withholding obligation exists, the purchaser must withhold the relevant amount at settlement and pay it to the ATO (a general interest charge may apply to late payments). The penalty for failing to withhold is equal to the amount that was required to be withheld and paid. An administrative penalty may also be imposed by the ATO.

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. However, conveyancers who are not legal practitioners or registered tax agents cannot complete the form on behalf of the vendor.

If you think you may be affected by the new withholding payment requirements, or if you are entering into any transactions which fall into the above criteria, please contact our Property & Projects team in either Brisbane or Sydney who will be able to discuss with you your options moving forward.

FOR MORE INFORMATION, PLEASE CONTACT:



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