

Capital gains withholding – for real estate agents

From 1 July 2017 Australian residents selling real estate with a market value of \$750,000 or more will need to apply for a clearance certificate from us to ensure amounts are not withheld from the sale proceeds.

Where a valid clearance certificate is not provided by settlement, the purchaser is required to withhold 12.5% of the purchase price and pay this to us.

Background

Foreign resident capital gains withholding (FRCGW) first applied to vendors disposing of certain taxable Australian property under contracts entered into from 1 July 2016. A 10% non-final withholding was applied to these transactions at settlement.

New rules for FRCGW apply to vendors disposing of certain taxable property under contracts entered into from 1 July 2017. The changes will apply to real property disposals where the contract price is \$750,000 and above (previously \$2 million) and the FRCGW withholding tax rate will be 12.5% (previously 10%). The existing threshold and rate will apply for any 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 types of taxable Australian property this applies to include vacant land, buildings, residential and commercial property, leaseholds and strata title schemes.

What this means for purchasers

Where a foreign resident disposes of Australian real property with a market value of \$750,000 or above, the purchaser will be required to withhold 12.5% of the purchase price and pay it to us unless the seller provides a variation. Australian residents will need to provide a clearance certificate otherwise a withholding of 12.5% of the purchase price will apply.

What this means for sellers

Australian resident vendors who dispose of Australian real property with a market value of \$750,000 or above will need to apply for a clearance certificate from us to ensure amounts are not withheld from their sale proceeds.

All transactions involving real property with a market value of \$750,000 or above will need the vendor and purchaser to consider if a clearance certificate is required.

If a purchase price negotiated between a purchaser and vendor is on an 'arm's length basis', then the purchase price may be used as a proxy for market value.

The legislation specifies that the 12.5% withholding is on the 'first element of the cost base'. However, as purchase price is understood by vendors and purchasers, and in many instances will be equal to the 'first element of the cost base', we have used the term purchase price for simplicity.

When will this apply?

The new withholding regime applies to contracts entered into on or after 1 July 2017 for the sale of property with a market value of \$750,000 or above.



What if there are multiple purchasers?

The market value of all purchasers' interests in the transaction must be aggregated in examining whether the \$750,000 market value threshold has been reached. If the aggregated purchase price is \$750,000 or above, each purchaser must withhold in proportion to their percentage of the total purchase price.

What if there are multiple vendors?

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

That is, if the market value is \$750,000 or above then the purchaser must withhold 12.5% of this (remembering that the purchase price may be able to be used as a proxy for market value).

If the purchaser has not been provided with a clearance certificate or a notice of 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 property, with the total withholding equal to 12.5% of the property's market value.

If any of the vendors provide a clearance certificate or a notice of variation then the amount withheld by the purchaser on that vendor's proportional interest in the property must reflect this. The purchaser must consider each vendor's circumstances separately in determining the amount to withhold from each vendor.

Clearance certificates

All real property transactions with a market value of \$750,000 or above will need the vendor and purchaser to consider if a clearance certificate is required.

Where a clearance certificate is provided, the purchaser is not required to withhold an amount from the purchase price.

Vendors need to provide a clearance certificate to the purchaser on or before the settlement of the transaction.

A clearance certificate must be valid at the time it is provided to the purchaser.

Clearance certificates are valid for 12 months, and can be used by the same vendor for the sale of multiple properties while valid.

Who can obtain a clearance certificate?

Only a vendor who is an Australian resident can be granted a clearance certificate by us.

Residency status for tax purposes is not the same as that for immigration purposes, or for the Foreign Investment Review Board (FIRB). If you are unsure, seek professional advice.

What if the vendor does not provide a clearance certificate?

If the vendor fails to provide the clearance certificate by settlement, the purchaser is required to withhold 12.5% of the purchase price and pay this to us.

This means Australian resident vendors of real property with a market value of \$750,000 or above must apply for a clearance certificate to ensure no funds are withheld from their sale proceeds.

When can an Australian resident vendor obtain a clearance certificate?

An Australian resident vendor may apply to us for a clearance certificate at any time when considering the disposal of real property. This can be before the property is listed for sale.

How can an Australian resident vendor obtain a clearance certificate?

To obtain a clearance certificate, a vendor who is an Australian resident (or their representative) must complete an online *Clearance certificate application for Australian residents* form. To access this form, visit ato.gov.au/FRCGW

If the vendor is automatically assessed as an Australian resident, a clearance certificate will be issued electronically within days of the application being submitted.

If there are data irregularities or exceptions, some manual processing may be required and the clearance certificate will be provided within 14–28 days.

Higher risk and unusual cases may require greater manual intervention and could take longer to process.

Variation applications

Where the vendor is not entitled to a clearance certificate, but believes a withholding of 12.5% is inappropriate, they can apply for a variation. Reasons for a variation could include:

- a foreign resident not making a capital gain on the transaction (for example, because they will make a capital loss or a CGT rollover applies)
- a foreign resident not otherwise having an income tax liability (for example, because of carried-forward capital losses or tax losses)

A variation application can be made using the *Variation application for foreign residents and other parties* form. To access this form, visit ato.gov.au/FRCGW

In the majority of cases (where we have all the required information and the application is successful), the notice of variation will be provided within 28 days.

The notice of variation should be shown to the purchaser before settlement to ensure the reduced withholding rate applies.

Does the withholding need to be provided prior to settlement?

No, the withholding does not need to be provided until settlement, and it is provided by the purchaser out of the purchase price, not in addition to the purchase price.

Is the transfer of ownership affected?

No, the withholding does not affect the transfer of ownership between the vendor and the purchaser.

In some cases the vendor may wish to postpone settlement if they have not yet obtained a clearance certificate or notice of variation, to avoid the purchaser withholding 12.5% of the purchase price and paying it to us. In this scenario, the terms of the contract will apply as normal for delays at settlement.

What do I need to consider when selling a property?

Where you are engaged by a vendor you need to know what the purchase price will be to determine whether this measure applies. If the purchase price is below \$750,000, and it has been negotiated on an arm's length basis, then no action is required.

If the purchase price is \$750,000 or above and the vendor is an Australian resident vendor, you should let them know they will need to obtain a clearance certificate from us to avoid 12.5% of the purchase price being withheld at settlement.

If you are unsure about the purchase price because the property is going to auction, you should let the Australian resident vendor know they will need a clearance certificate if the purchase price reaches \$750,000.

If the purchase price is \$750,000 or above and the vendor is a foreign resident, you should let them know that 12.5% of the purchase price will be withheld at settlement by the purchaser and provided to us. You should advise them they may be able to vary the amount that is withheld at settlement in certain circumstances, and direct them to ato.gov.au/FRCGW

What if there is a short settlement period?

The same rules apply irrespective of the length of the settlement period. However, if there is a short settlement period you should advise the vendor they will need to obtain a clearance certificate or notice of variation (as appropriate) as soon as possible if they wish to avoid 12.5% of the purchase price being withheld at settlement.

More information

The Australian Institute of Conveyancers was extensively involved in the consultation process for this measure. As such, we are not aware of any inconsistency with the terms of each state's Conveyancing Act.

This is general information only. For more detailed information about foreign resident capital gains withholding payments, visit ato.gov.au/FRCGW