

EXPOSURE DRAFT

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Inserts for
**Tax and Superannuation Laws
Amendment (2015 Measures No. 5) Bill
2015: Foreign resident capital gains
withholding payments**

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1.		
2. Schedule #	The day after this Act receives the Royal Assent.	
3.		

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Schedule #—Foreign resident capital gains withholding payments

Part 1—Main amendments

Taxation Administration Act 1953

1 At the end of Division 14 in Schedule 1

Add:

Subdivision 14-D—Gains involving foreign residents and taxable Australian property

Table of sections

14-200	Certain acquisitions of taxable Australian property from foreign residents
14-205	Effect of look-through earnout rights
14-210	Whether an entity is a relevant foreign resident
14-215	Excluded transactions
14-220	Entity declarations
14-225	Varying amounts to be paid to the Commissioner

14-200 Certain acquisitions of taxable Australian property from foreign residents

(1) You must pay to the Commissioner an amount if:

- (a) you *acquire a *CGT asset from one or more entities; and
- (b) section 14-210 (about foreign residents) applies to at least one of those entities; and
- (c) the CGT asset is:
 - (i) *taxable Australian real property; or
 - (ii) an *indirect Australian real property interest; or
 - (iii) an option or right to acquire such property or such an interest;

unless a transaction acquiring the CGT asset is excluded under section 14-215.

Note: You must pay the amount on account of income tax payable by the entities on their gain resulting from your acquisition of the CGT asset.

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- 1 (2) You must pay the amount to the Commissioner on or before the
2 day when you became the *CGT asset's owner.

3 Note: There are penalties for failing to pay the amount (see Division 16).

- 4 (3) The amount to be paid to the Commissioner is:
5 (a) unless paragraph (b) applies—an amount equal to 10% of the
6 first element of the *CGT asset's *cost base just after the
7 *acquisition; or
8 (b) the varied amount applying under section 14-225.

9 **14-205 Effect of look-through earnout rights**

- 10 (1) You must pay to the Commissioner an amount if:
11 (a) you are required under subsection 14-200(1) to pay an
12 amount to the Commissioner in relation to your *acquisition
13 of a *CGT asset; and
14 (b) under a *look-through earnout right relating to the CGT asset
15 and the acquisition, you provide a *financial benefit to one or
16 more entities; and
17 (c) section 14-210 (about foreign residents) applies to at least
18 one of those entities;

19 unless a transaction acquiring the CGT asset is excluded under
20 section 14-215.

21 Note: You must pay the amount on account of income tax payable by the
22 entities on their gains from receiving the financial benefit.

- 23 (2) You must pay the amount to the Commissioner on or before the
24 day you provide the *financial benefit.

25 Note: There are penalties for failing to pay the amount (see Division 16).

- 26 (3) The amount to be paid to the Commissioner is:
27 (a) unless paragraph (b) applies—an amount equal to 10% of the
28 *market value of the *financial benefit; or
29 (b) the varied amount applying under section 14-225.

30 **14-210 Whether an entity is a relevant foreign resident**

31 *Is the entity a foreign resident?*

- 32 (1) This section applies to an entity for an *acquisition, or *financial
33 benefit, (the *transaction*) if any of the following conditions is
34 satisfied:

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- 1 (a) you know that the entity is a foreign resident;
2 (b) you reasonably believe that the entity is a foreign resident;
3 (c) you do not reasonably believe that the entity is an Australian
4 resident, and either:
5 (i) the entity has an address outside Australia (according to
6 any record that is in your possession, or is kept or
7 maintained on your behalf, about the transaction); or
8 (ii) you are authorised to provide a financial benefit relating
9 to the transaction to a place outside Australia (whether
10 to the entity or to anyone else);
11 (d) the entity has a connection outside Australia of a kind set out
12 in the regulations.

13 Note: This subsection is relevant to whether you must pay an amount to the
14 Commissioner under section 14-200 or 14-205.

15 *Excluded entities—declaration that an Australian resident or that*
16 *asset not an indirect Australian real property interest*

- 17 (2) Despite subsection (1), this section does not apply to the entity for
18 the purposes of section 14-200 or 14-205 if, before you pay the
19 Commissioner under that section:
20 (a) the entity gives you a declaration under section 14-220 about
21 the transaction; and
22 (b) you do not know the declaration to be false.

23 14-215 Excluded transactions

24 A transaction that *acquires a *CGT asset is excluded under this
25 section if:

- 26 (a) in a case where the CGT asset:
27 (i) is real property that is or contains *residential premises;
28 or
29 (ii) is an interest in real property that is or contains
30 residential premises;
31 the *market value of the real property just after the
32 transaction is less than \$2.5 million; or
33 (b) the transaction is on an *approved stock exchange, and the
34 CGT asset is an interest listed for quotation in the official list
35 of that exchange; or
36 (c) an *amount is already required to be withheld from a
37 *withholding payment relating to the transaction.
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Note: This section is relevant to whether you must pay an amount to the Commissioner under section 14-200 or 14-205.

14-220 Entity declarations

Declaration that an Australian resident etc.

(1) An entity may give you a written declaration, about an *acquisition or *financial benefit, to the effect that:

(a) at the time of the acquisition or provision of the financial benefit (as applicable), the entity is an Australian resident; or

(b) just after that time, the entity is carrying on a *business through an *Australian permanent establishment.

Note 1: Such a declaration could result in you not being required to pay an amount under this Subdivision (see subsection 14-210(2)).

Note 2: False or misleading statements in a declaration may attract an administrative penalty (see subsection 284-75(4)).

Declaration that asset not an indirect Australian real property interest

(2) An entity may give you a written declaration, about a transaction that *acquires a *CGT asset, to the effect that the *CGT asset is a *membership interest but not an *indirect Australian real property interest.

Note 1: Such a declaration could result in you not being required to pay an amount under this Subdivision (see subsection 14-210(2)).

Note 2: False or misleading statements in a declaration may attract an administrative penalty (see subsection 284-75(4)).

14-225 Varying amounts to be paid to the Commissioner

Policies relevant to varying amounts

(1) In exercising a power under this section to vary an amount, the Commissioner must have regard to both of these policies:

(a) ensuring the efficient collection of a foreign resident's capital gains tax liabilities; and

(b) protecting a secured creditor's right to realise or otherwise deal with the creditor's security.

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Varying particular amounts

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- 2 (2) The Commissioner may, in writing, vary a particular amount
3 payable by you to the Commissioner under this Subdivision. The
4 variation takes effect when you become aware of it.
- 5 Note: Decisions to vary, or not to vary, are reviewable (see section 20-80).
- 6 (3) Any of the following entities may apply to the Commissioner in
7 the *approved form for a variation under subsection (2):
- 8 (a) you;
- 9 (b) an entity to which section 14-210 (about foreign residents)
10 applies or could apply in relation to you;
- 11 (c) an entity for whom the *CGT asset was security, and who
12 caused your *acquisition of the CGT asset by exercising a
13 power to realise or otherwise deal with that security.
- 14 (4) A variation made under subsection (2) is not a legislative
15 instrument.

Varying classes of amounts

- 16
- 17 (5) The Commissioner may, by legislative instrument, vary classes of
18 amounts payable to the Commissioner under this Subdivision.

Amounts may be reduced to nil

- 19
- 20 (6) The Commissioner's power under subsection (2) or (5) to vary an
21 amount includes the power to reduce the amount to nil.

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1 **Part 2—Other amendments**

2 ***Income Tax Assessment Act 1936***

3 **2 At the end of section 202**

4 Add:

5 (s) to facilitate the administration of Subdivision 14-D in
6 Schedule 1 to the *Taxation Administration Act 1953*.

7 ***Income Tax Assessment Act 1997***

8 **3 Section 855-15 (note)**

9 Omit “Note:”, substitute “Note 1:”.

10 **4 At the end of section 855-15**

11 Add:

12 Note 2: Payments may need to be made to the Commissioner for acquisitions
13 of some of kinds of taxable Australian property if foreign residents are
14 involved (see Subdivision 14-D in Schedule 1 to the *Taxation*
15 *Administration Act 1953*).

16 **5 Subsection 995-1(1) (paragraph (b) of the definition of**
17 ***amount required to be withheld*)**

18 Omit “*non-cash benefit of which the withholding payment consists”,
19 substitute “*non-cash benefit or gain to which the withholding payment
20 relates”.

21 **6 Subsection 995-1(1) (paragraph (b) of the definition of**
22 ***amount withheld*)**

23 Omit “*non-cash benefit of which the withholding payment consists”,
24 substitute “*non-cash benefit or gain to which the withholding payment
25 relates”.

26 **7 Subsection 995-1(1) (paragraph (c) of the definition of**
27 ***withholding payment*)**

28 After “*non-cash benefit”, insert “, or gain”.

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1 **8 Subsection 995-1(1) (note 2 at the end of the definition of**
2 ***withholding payment*)**

3 Omit “or non-cash benefit”, substitute “, non-cash benefit or gain”.

4 ***Taxation Administration Act 1953***

5 **9 Paragraph 8WA(1AA)(b)**

6 Omit “or (r)”, substitute “, (r) or (s)”.

7 **10 Paragraph 8WB(1A)(a)**

8 Omit “or (r)”, substitute “, (r) or (s)”.

9 **11 Paragraph 8WB(1A)(b)**

10 Omit “or (r)”, substitute “, (r) or (s)”.

11 **12 Paragraph 10-5(2)(b) in Schedule 1**

12 Repeal the paragraph, substitute:

13 (b) non-cash benefits, and gains involving foreign residents and
14 certain kinds of taxable Australian property (see
15 Division 14).

16 **13 Subsection 10-5(2) in Schedule 1 (note)**

17 After “non-cash benefit”, insert “or gain”.

18 **14 Subsections 16-70(3) and (4) in Schedule 1**

19 Repeal the subsections, substitute:

20 (3) An entity that must pay an amount to the Commissioner under
21 Subdivision 14-B, 14-C or 14-D must do so in accordance with
22 sections 16-80 and 16-85.

23 Note: For provisions about the collection and recovery of amounts payable
24 to the Commissioner under this Part, see Part 4-15.

25 **15 Section 16-80 in Schedule 1**

26 Omit “16-70(1), (3) or (4)”, substitute “16-70(1) or (3)”.

27 **16 Paragraphs 16-140(1)(b) and 16-143(2)(b) in Schedule 1**

28 After “non-cash benefits”, insert “or gains”.

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1 **17 Paragraph 16-150(b) in Schedule 1**

2 After “non-cash benefits”, insert “or gains”.

3 **18 Subparagraph 18-65(1)(a)(ii) in Schedule 1**

4 After “Division 14”, insert “(other than Subdivision 14-D)”.

5 **19 Paragraph 18-65(6)(c) in Schedule 1**

6 After “14”, insert “(other than Subdivision 14-D)”.

7 **20 Subparagraph 18-70(1)(a)(ii) in Schedule 1**

8 After “*non-cash benefit”, insert “or gain”.

9 **21 Section 20-80 in Schedule 1 (after table item 10)**

10 Insert:

14 Decision under subsection 14-225(2) not to vary an amount on application
under subsection 14-225(3)

15 Decision under subsection 14-225(2) to vary an amount

11 **22 Subsection 250-10(2) in Schedule 1 (after table item 100)**

12 Insert:

101 payment of amount to 14-200 or *Taxation Administration Act 1953*
Commissioner 14-205 in
Schedule 1

13 **23 Application of amendments**

14 The amendments made by this Schedule apply in relation to acquisitions
15 of CGT assets on or after 1 July 2016.

16 Note: For working out when a CGT asset is acquired, see Division 109 of the *Income Tax*
17 *Assessment Act 1997*.