

2024

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT BILL 2024: FOREIGN RESIDENT CAPITAL
GAINS WITHHOLDING PAYMENTS

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

Treasury and the ATO work closely to identify aspects of new tax laws which may benefit from ATO public advice and guidance (PAG). Feedback is also sought on any aspects of the new law where ATO PAG should be considered, to support stakeholders' understanding and application of the new law. Stakeholder feedback on this question will be shared with the ATO.

Table of Contents

Glossary.....	iii
Chapter 1: Foreign resident capital gains withholding	5

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
Commissioner	Commissioner of Taxation
CGT	Capital gains tax
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
FRCGW	Foreign residents' capital gains withholding
TAA 1953	<i>Taxation Administration Act 1953</i>

Chapter 1: Foreign resident capital gains withholding

Outline of chapter

- 1.1 Schedule 1 to the Bill amends Subdivision 14-D in Schedule 1 to the TAA 1953 to modify the FRCGW regime to:
 - increase the withholding rate to 15 per cent (from 12.5 per cent); and
 - remove the threshold before which withholding applies so that disposals of relevant CGT assets by a foreign resident are subject to FRCGW requirements regardless of the market value of the CGT asset.
- 1.2 These amendments seek to ensure better compliance by foreign residents with their Australian tax obligations and support the collection of tax liabilities from foreign residents.
- 1.3 All legislative references in this Chapter are to Schedule 1 to the TAA 1953 unless otherwise specified.

Context of amendments

- 1.4 As part of the 2023-24 Mid-Year Economic and Fiscal Outlook, the Government announced that it will increase the integrity of the FRCGW regime by increasing the FRCGW rate to 15 per cent, from 12.5 per cent, and removing the threshold before which withholding applies. The threshold being removed exempted transactions of less than \$750,000 involving either taxable Australian real property or an indirect Australian real property interest that provides company title interests. This measure complements the Government's initiatives to improve housing affordability for Australians.
- 1.5 The FRCGW regime, as set out in Subdivision 14-D in Schedule 1 to the TAA 1953, imposes a non-final withholding obligation on the purchaser of certain Australian real property and related interests where the property is acquired from a foreign resident vendor.
- 1.6 The FRCGW regime first came into effect on 1 July 2016 to:
 - assist with the collection of CGT liabilities owed by foreign residents; and
 - address low levels of compliance by foreign residents with their Australian tax obligations.

- 1.7 Under the current law, if a FRCGW obligation arises, the purchaser is required to withhold from the seller/vendor 12.5 per cent of the first element of the cost base of the CGT asset that they acquired and pay that amount to the Commissioner. The first element of the cost base of the CGT asset is usually the purchase price of the asset.
- 1.8 The vendor is entitled to a credit for amounts withheld upon the lodgement of an income tax return and the making of an income tax assessment. Excess credits are refundable to the vendor by the Commissioner.
- 1.9 However, a FRCGW obligation does not arise in relation to a CGT asset if, so far as is relevant, the market value of the CGT asset is less than \$750,000 and the CGT asset is:
- taxable Australian real property; or
 - an indirect taxable Australian real property interest, the holding of which causes a company title interest to arise.
- 1.10 The withholding rate was last increased to the current 12.5 per cent, from 10 per cent, and the withholding threshold was reduced to the current \$750,000, from \$2 million, from 1 July 2017.
- 1.11 The current 12.5 per cent withholding rate is increasingly falling short of assessed CGT liabilities of foreign residents in respect of income tax payable on capital gains. This reflects the upwards shifts in Australian real property valuations, particularly for residential property.
- 1.12 Where a final CGT liability is greater than an amount withheld by the purchaser, there is an incentive for foreign residents to not lodge an Australian income tax return and, in doing so, delay (and possibly avoid) the payment of their Australian income tax liability. Increasing the withholding rate will better support the collection of income tax liabilities and further incentivise foreign residents to lodge an Australian income tax return so their final tax liabilities can be properly assessed and collected.
- 1.13 By removing the threshold before which FRCGW applies the integrity of the FRCGW regime will be increased by ensuring that amounts are withheld to cover liabilities from the disposal of certain Australian real property assets by foreign residents regardless of the market value of underlying CGT asset. This provides for a more equitable treatment of disposals of Australian real property interests by foreign residents with respect to Australia's FRCGW regime.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
<p>Subdivision 14-D in Schedule 1 to the TAA 1953 imposes a non-final withholding obligation on the purchaser of certain Australian real property and related interests where the property is acquired from a foreign resident vendor.</p> <p>If a FRCGW obligation arises, the purchaser will be required to withhold from the seller/vendor 15 per cent of the first element of the cost base of the CGT asset that they acquired and pay that amount to the Commissioner.</p> <p>The first element of the cost base of the CGT asset is usually the purchase price of the asset. This amount may be withheld from the payment the purchaser makes to the vendor.</p> <p>A FRCGW payments obligation will arise in relation to the disposal of a relevant CGT asset by a foreign resident, regardless of the market value of the CGT asset.</p>	<p>Subdivision 14-D in Schedule 1 to the TAA 1953 imposes a non-final withholding obligation on the purchaser of certain Australian real property and related interests where the property is acquired from a foreign resident vendor.</p> <p>If a FRCGW obligation arises, the purchaser will be required to withhold from the seller/vendor 12.5 per cent of the first element of the cost base of the CGT asset that they acquired and pay that amount to the Commissioner.</p> <p>The first element of the cost base of the CGT asset is usually the purchase price of the asset. This amount may be withheld from the payment the purchaser makes to the vendor.</p> <p>However, a FRCGW obligation will not arise in relation to a CGT asset if, so far as is relevant, the market value of the CGT asset is less than \$750,000 and the CGT asset is:</p> <ul style="list-style-type: none"> • taxable Australian real property; or • an indirect taxable Australian real property interest, the holding of which causes a company title interest to arise.

Detailed explanation of new law

Increasing the withholding tax rate

- 1.14 Currently, if a FRCGW obligation arises in relation to the acquisition of a CGT asset from a foreign resident, the amount of withholding is 12.5 per cent of the first element of the cost base of the CGT asset. The first element of the cost base of the CGT asset is usually the purchase price of the asset. This amount may be withheld from the payment the purchaser makes to the vendor.

- 1.15 These amendments increase the rate of withholding to 15 per cent.
[Schedule 1, items 1 and 2, paragraphs 14-200(3)(a) and 14-205(4)(a) of Schedule 1 to the TAA 1953]
- 1.16 Consequently, if a FRCGW obligation arises, purchasers will need to withhold from the vendor 15 per cent of, generally, the purchase price of the CGT asset and pay the withheld amount to the Commissioner. This amount will subsequently be available to the vendor as a credit to apply to any income tax liability that arises upon the making of an income tax assessment.

Removing the withholding threshold

- 1.17 Currently, a FRCGW obligation does not arise in relation to a CGT asset if, so far as is relevant, the market value of the CGT asset is less than \$750,000 and the CGT asset is:
- taxable Australian real property; or
 - an indirect taxable Australian real property interest, the holding of which causes a company title interest to arise.
- 1.18 These amendments remove the \$750,000 exclusion threshold.
[Schedule 1, items 3 to 6, subsection 14-215(1) heading, subsection 14-215(1), paragraph 14-215(1)(a) and subsections 14-215(2) and (3) of Schedule 1 to the TAA 1953]
- 1.19 Consequently, a FRCGW obligation will arise in relation to the disposal of a relevant CGT asset by a foreign resident, regardless of the market value of the CGT asset. Other transactions that are currently excluded from the FRCGW regime remain unamended and continue to apply. The Commissioner's power to vary particular amounts, or classes of amounts, of withholding by a purchaser under the FRCGW regime also continues to apply.
- 1.20 Vendors can continue to apply for clearance certificates from the Commissioner to advise purchasers that they are not a foreign resident in respect of an Australian real property transaction or an indirect Australian real property interest that provides company title interests.
- 1.21 For any other relevant asset, the vendor can still make a residency declaration or a declaration that the asset is not an indirect Australian real property interest. This measure does not amend the approach to these processes.

Commencement, application, and transitional provisions

- 1.22 Schedule 1 to the Bill commences on the first 1 January, 1 April, 1 July or 1 October to occur after the day the Bill receives Royal Assent.

- 1.23 The amendments apply to acquisitions made on or after the later of the start of 1 January 2025 and the commencement of Schedule 1.
- 1.24 A purchaser is generally taken to have acquired an asset on the date they entered into the contract to acquire it (see Division 109 of the ITAA 1997). Therefore, these amendments will not apply to transfers that occur under a contract entered into prior to the later of the start of 1 January 2025 and the commencement of Schedule 1.

[Schedule 1, item 7]