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5 August 2024

Dear Sir/Madam,

### **Improving the foreign resident capital gains withholding tax regime**

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 173,000 members in over 100 countries and regions. We make this submission in response to the exposure draft legislation, **Improving the foreign resident capital gains withholding tax regime** (Exposure Draft) released on 23 July 2024 on behalf of our members and in the broader public interest.

We broadly support the government's announced measure in the 2023–24 Mid-Year Economic and Fiscal Outlook to improve the integrity of the foreign resident capital gains withholding (FRCGW) regime.

However, we recommend the Commissioner of Taxation (Commissioner) consider issuing legislative instruments under Section 14-235(5) of the *Taxation Administration Act 1953 (TAA)* to vary the FRCGW rate to nil in circumstances where amounts relating to certain related party transfers do not give rise to a capital gains tax (CGT) liability.

Please refer to the Appendix for our detailed discussions. If you have any queries, contact Jenny Wong, Tax Policy Lead at [jenny.wong@cpaustralia.com.au](mailto:jenny.wong@cpaustralia.com.au) or Bill Leung, Tax Technical Advisor at [bill.leung@cpaustralia.com.au](mailto:bill.leung@cpaustralia.com.au).

Yours sincerely,

*R Subramanian*

Ram Subramanian  
Interim Head of Policy and Advocacy



### Detailed discussion

#### Summary

CPA Australia welcomes the opportunity to provide feedback on the Exposure Draft.

We broadly support the government's announced measure in the 2023–24 Mid-Year Economic and Fiscal Outlook to improve the integrity of the FRCGW regime.

However, we recommend the Commissioner issues legislative instruments to vary the FRCGW rate to nil in relation to classes of amounts arising from certain related party transfers where no CGT liability arises.

#### Detailed comment

We understand Treasury is seeking feedback on the effectiveness of the Explanatory Materials (EM) in explaining the policy context and operation of the proposed new law as set out on page 2 of the EM. Specifically, the Consultation Preamble notes that Treasury and the Australian Taxation Office (ATO) work closely to identify aspects of new tax laws which may benefit from ATO public advice and guidance (PAG) and that feedback is also sought on any aspects of the new law where ATO PAG should be considered.

We broadly support the government's announced measure in the 2023–24 Mid-Year Economic and Fiscal Outlook to improve the integrity of the foreign resident capital gains withholding (FRCGW) regime.

However, we would like to highlight the expanded scope of the FRCGW could create significant compliance obligations in certain ordinary related party transfers, such as:

- transfers of properties between members of tax consolidated groups;
- transfers under various CGT rollovers such as from individuals/trusts/partnerships to wholly owned companies;
- in specie distributions of properties from trusts to beneficiaries;
- in specie transfers of properties from members to SMSFs;
- transfers of properties between spouses

In many of these cases, there will not be a CGT liability. However, if the transferor does not obtain an ATO clearance certificate, the transferee is subject to FRCGW. If they fail to withhold and remit the proposed 15% of the first element of the CGT asset's cost base, penalties will apply. This is the case even if the underlying transfer is not subject to CGT.

The ATO has issued class variations by way of a Legislative Instrument (under section 14-235(5) of the TAA) relating to situations where the rate of FRCGW rate is reduced to nil involving transfers from a deceased to executors/beneficiaries/survivors, income tax exempt entities, and transfers under a marriage breakdown, which are very helpful in practice.

We recommend the Commissioner issue legislative instruments to cover the scenarios mentioned above to have the rate of FRCGW reduced to nil in circumstances where certain related party transfers do not give rise to a CGT liability.