

# 2018 NSW Contract for Sale and Purchase of Land and the 'GST at settlement' measure

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As legal practitioners are aware, the foreign resident capital gains withholding ('FRCGW') regime under the *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016* (Cth) requires purchasers of land and interests in land from foreign resident vendors to withhold from the purchase price an amount on account of the vendor's capital gains tax liability and remit that amount to the Australian Taxation Office ('ATO'). The FRCGW was the driver behind the 2016 and 2016/2017 editions of the NSW contract for the sale and purchase of land.

The need for a 2018 edition ('2018 Edition') has similarly been largely driven by the passage of the *Treasury Laws Amendment (2018 Measures No. 1) Act 2018* (Cth) ('2018 Act'). This legislation introduces new Subdivision 14-E (GST payable on taxable supplies of certain real property) in Schedule 1 to the *Taxation Administration Act 1953* (Cth) ('TAA') from 1 July 2018. (Unless otherwise stated, references to legislation in this article are to Schedule 1 to the TAA.)

The other changes in the 2018 Edition are summarised on the ECOS portal and the Law Society website (see: [https://www.law-society.com.au/sites/default/files/2018-05/1362899\\_1\\_0.pdf](https://www.law-society.com.au/sites/default/files/2018-05/1362899_1_0.pdf)).

## General

The 2018 Act requires purchasers of certain new residential premises or certain potential residential land that is included in a property subdivision plan to withhold an amount from the purchase price on account of the vendor's GST liability and remit it, on or before settlement, directly to the ATO. The vendor is entitled to a GST withheld credit for the amount paid to the ATO by the purchaser when the vendor's net amount is determined on the vendor's GST return (s 18-60). This 'GST at settlement' measure ('GST withholding regime') is targeted at 'phoenixing' activity by property developers who claim input tax credits and collect GST from purchasers on settlement of the sales of new residential

## Snapshot

- The 2018 edition of the NSW contract for sale and purchase of land includes a process to assist practitioners in dealing with the new 'GST at settlement' regime which commences on 1 July 2018.
- This regime requires purchasers of 'new residential premises' or 'potential residential land' to withhold an amount from the purchase price on account of the vendor's GST liability and remit it, on or before settlement, directly to the ATO.
- The vendor is entitled to a credit for GST withheld for the amount paid to the ATO by the purchaser when the vendor's net amount is assessed on the vendor's GST return.

property but dissolve their businesses before their next BAS lodgment to avoid remitting the collected GST.

By making purchasers of new residential property primarily responsible for the payment of the GST for which vendors become liable at settlement, the GST withholding regime 'removes the delay in the payment of GST which is the main enabler of current evasion activity in this area' (Paragraph 1.7, 2018 Act Explanatory Memorandum).

## Differences between FRCGW and GST withholding regimes

Although both the FRCGW and GST withholding regimes require certain purchasers of land to withhold amounts from the purchase price and remit those amounts to the ATO on account of their vendors' tax liability, there are important differences

between the two regimes, such as:

- while the FRCGW regime applies where the purchase price for the land (or interest in land) exceeds a particular threshold (currently \$750,000 or more), the GST withholding regime will affect all relevant land disposals, regardless of the purchase price;
- while foreign vendors can obtain clearance certificates from the ATO which exempt those vendors from the FRCGW regime, 'GST-compliant' vendors of relevant land cannot obtain ATO exemptions from the GST withholding regime (although the ATO can determine by legislative instrument that the obligation to withhold does not apply to certain kinds of supplies); and
- while foreign vendors can apply to the ATO to vary the FRCGW remittance amount (currently 12.5%), 'GST-compliant' vendors of relevant land cannot apply to vary the GST withholding rates in the 2018 Act.

Accordingly, the GST withholding regime is likely to involve more transactions than the FRCGW regime.

## Transactions to which GST withholding regime applies

The GST withholding regime applies to sales or long term leases (more than 50 years)<sup>1</sup> of:

- ‘new residential premises’ (s 40-75 of *A New Tax System (Goods and Services Tax) Act 1999* (**‘GST Act’**)) being residential premises not previously sold as residential premises or built to replace demolished premises on the same land that are not created through substantial renovations and are not commercial residential premises (s 14-240(2)(a)); and
- ‘potential residential land’ (s 195-1 *GST Act*) being land permissible to use for residential premises<sup>2</sup> that is included in a property subdivision plan (including deposited plans and strata plans, see s 195-1 *GST Act*) but does not contain any buildings that are residential premises or in use for a commercial purpose (s 14-250(2)(b))<sup>3</sup>,

that are settled (see Item 26 of Part 3 of the 2018 Act) on or after 1 July 2018, unless the contract is entered into before 1 July 2018 and settlement occurs before 1 July 2020 (Item 27 of Part 3 of the 2018 Act)<sup>4</sup>.

## Vendors’ obligation to notify purchasers

As vendors will know whether the transaction is one which falls within the GST withholding regime and, if so, the amount that the purchaser will be required to withhold, vendors of residential premises or potential residential land<sup>5</sup> must notify purchasers in writing before making the supply (i.e. usually before settlement) whether the purchaser is required to make a withholding payment (s 14-255(1)). Unlike the withholding obligation which only applies to purchasers of new residential premises or potential residential land, the notification requirement applies to the supply of **all** residential premises or potential residential land by way of sale or long term lease.

Where the purchaser is:

- not required to withhold (for example, because the transaction relates to existing residential premises or commercial residential premises), the vendor’s notification need only provide that information (s 14-255(a)(i)); or
- required to withhold, the vendor must provide the name and ABN of the supplier, the amount to be withheld (e.g. 1/11<sup>th</sup> of purchase price or actual amount, if known), the date when the amount will need to be withheld (e.g. on settlement or on actual date, if known) and such other matters as are specified in the regulations. These details are required to enable the purchaser to complete the ATO on-line forms referred to below (see Purchaser’s obligation to notify the ATO).

The vendor can either provide the required notification as part of the contract (or long term lease) or in a separate document.

Under the 2018 Edition the vendor will provide the notification in the contract where the relevant information is known to the vendor at the contract date. Otherwise (e.g. where the purchase

price is not known because new residential premises are sold at auction), the 2018 Edition provides (on page 2) that the vendor must provide all the required information to the purchaser in a separate notice within 14 days of the contract date.

## Purchasers’ withholding obligation

Purchasers required to withhold must withhold:

- where the margin scheme does not apply, 1/11<sup>th</sup> of the purchase price (not taking into account normal settlement adjustments)<sup>6</sup> or, if the contract does not specify a purchase price, the GST-inclusive market value of the consideration (ss 14-250(6)(b) and (7));
- where the margin scheme applies, 7 per cent of the purchase price (or the greater amount determined by the Minister which cannot be set at more than 9 per cent of the purchase price) (ss 14-250(6) and (8)); or
- where the contract is between associates without consideration or for less than market value, 10 per cent of the GST-exclusive market value of the supply (s 14-250(9)).

The purchaser must remit the withholding amount to the ATO ‘on or before’ the day that consideration for the supply is first provided, other than consideration provided as a genuine deposit (s 14-250(4)(a)(i))<sup>7</sup>.

No withholding obligation arises if a deposit is forfeited but the release of a deposit to the vendor before settlement will trigger the purchaser’s withholding obligation on the full purchase price, as will the first payment of an instalment under an instalment contract.

The 2018 Edition defines the withholding amount as a residential withholding payment (**‘RW payment’**) and the rate for determining the RW payment as the residential withholding rate (**‘RW rate’**).

Although purchasers are required to remit the RW payment to the ATO ‘on or before’ settlement, it is unlikely that any such payments will be made ‘before’ settlement. Further, unless settlement occurs electronically, it is also unlikely that such payments will be made ‘on’ settlement.

The ATO allows ‘a short grace period from, and including the date of settlement’ for the FRCGW to be paid in full<sup>8</sup>. Hopefully the ATO will similarly allow a ‘short grace period’ after settlement for remittance of the RW payment.

## Purchaser’s obligation to notify the ATO

The ATO requires withholding purchasers or their representatives to complete two on-line forms:

- the ‘GST property settlement withholding notification’ (**‘Withholding Notification Form’**) before settlement. This form advises the ATO of the sale and generates a lodgment reference number or **‘LRN’** and a payment reference number or **‘PRN’**; and





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- the ‘GST property settlement date confirmation’ (**‘Settlement Date Confirmation Form’**) on or before settlement. The purchaser will provide its LRN and PRN and will use its PRN when submitting the RW payment to the ATO. The ATO will send a confirmatory email to the purchaser’s email address provided in the Settlement Date Confirmation Form once the RW payment has been received by the ATO.

#### **Offences by vendor**

A failure by a vendor to provide the notification referred to above (see Vendors’ obligation to notify purchasers) (or providing an incorrect notification) is both a strict liability offence (ss 14-255(4) and (5))<sup>9</sup> (and an administrative offence) (s 14-255(6))<sup>10</sup>. However, a vendor’s failure to provide the notification (or a correct notification) does not affect the purchaser’s withholding obligation (s 14-255(3)).

If a purchaser does not receive a withholding notification or is advised that no notification is required in circumstances where the purchaser is uncertain as to its withholding obligation, the purchaser may withhold the RW payment and remit it to the ATO. Such payment discharges the purchaser from liability to account for the RW payment to the vendor under the contract (s 16-20).

Where a purchaser makes an RW payment to the ATO in error, the vendor may apply to the ATO for a refund of the amount of the RW payment (s 16-25). The issue of the refund is not automatic as the Commissioner of Taxation (**‘Commissioner’**)

may have regard to the circumstances that gave rise to the purchaser’s error or uncertainty.

#### **Offence by purchaser**

A purchaser’s failure to withhold and remit the RW payment to the ATO renders the purchaser liable to an administrative penalty equal to the RW payment (s 16-30), subject to the following defences:

- purchaser relied on an incorrect notice by the vendor where such reliance was not ‘unreasonable’ having regard to the information known to the purchaser (s 16-30(2))<sup>11</sup>; or
- on or before settlement, the purchaser gave the vendor a bank cheque payable to the Commissioner for the RW payment (**‘Bank Cheque Defence’**) (s 16-30(3)).

Although it is customary for purchasers to produce bank cheques at settlement for council and water rates adjustments and to forward those cheques to the relevant authorities after settlement, some vendors may require purchasers to hand over on settlement a bank cheque for the RW payment so they can remit the bank cheque to the ATO because:

- the RW payment is likely to be substantially higher than other adjustments;
- the vendor cannot claim a credit for GST withheld until the ATO receives the RW payment; and
- the purchaser can rely on the Bank Cheque Defence should the vendor fail to remit the RW payment to the ATO.

However, as the Bank Cheque Defence only relieves a purchaser from its obligation under s 14-250(1) to make the RW payment and is not a complete defence to the purchaser's liability under the 2018 Act, the 2018 Edition adopts the usual practice of the purchaser producing a bank cheque for the RW payment on settlement and remitting it to the ATO immediately after settlement<sup>12</sup>.

### GST withholding regime clauses in 2018 edition

<b>Page 2, Tax information</b>	A new tick-a-box choice to enable <u>all</u> vendors of residential land to comply with the statutory notification obligation by indicating whether/not a withholding is required.  The default choice is that the transaction is <u>not</u> subject to a withholding.  If a transaction is subject to a withholding, the vendor must provide further details about each 'supplier' (including not just the matters referred to in s 14-255(1)(b) but all other information needed by the purchaser to complete the ATO on-line forms).  Although the vendor will frequently be the 'supplier', this may not always be the case (e.g. where the vendor is part of a GST group or a participant in a GST joint venture).
<b>Page 6, Warnings</b>	New Warning 12 to alert the parties to the GST withholding measure and its impact on the vendor.
<b>Page 7, clause 1 (Definitions)</b>	New definitions of 'RW payment' and 'RW rate'.
<b>Page 11, clause 13 (GST)</b>	New clause 13.13 (largely reflecting the FRCGW procedure in clause 31) which will only apply where the vendor indicates in the tick-a-box choice that a withholding is required. If so, the purchaser must: <ul style="list-style-type: none"> <li>at least 5 days before the date for completion, provide evidence to the vendor that the purchaser (or the transferee named in a transfer by direction under clause 4.3) has submitted a Withholding Notification Form;</li> <li>produce on completion a settlement cheque for the RW payment payable to the Commissioner;</li> <li>forward the settlement cheque to the Commissioner immediately after completion; and</li> <li>serve on the vendor evidence of receipt of payment of the RW payment.</li> </ul>
<b>Page 12, clause 16.7</b>	An amendment to reflect that the price payable to the vendor will be reduced by any RW payment.
<b>Page 18, clause 30.11.3</b>	An amendment to make it clear that the purchaser's obligations in clauses 13.13.2 – 13.13.4 relating to the RW payment settlement cheque will not apply where completion takes place electronically.

Clause 31.13 of the 2018 Edition is suitable for use in sales of new residential premises and potential residential land to 'mum and dad' purchasers but is not necessarily appropriate for business to business transactions or transactions involving non-monetary consideration or between associates for less than market value. Special conditions may need to be drafted to deal with such transactions. **LSJ**

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### ENDNOTES

- 1 See GSTR 2003/3 for guidance on meaning of 'new residential premises' and GST 2012/5 on meaning of 'residential premises'.
- 2 Where the planning laws permit a number of uses for the land, one of which is residential, then the land will be potential residential land.
- 3 The 'potential residential land' requirements do not apply to business to business transactions where the purchaser of potential residential land is registered for GST and acquires the land for a creditable purpose: s 14-250(1)(b). For example, purchases to build to rent are not a creditable purpose. Whether land is 'potential residential land' is determined at the date of settlement of the contract.
- 4 Item 28 contains grandfathering provisions for some existing project development agreements entered into before 1 July 2018. Purchases pursuant to call options entered into before 1 July 2018 and exercised on or after 1 July 2018 are not grandfathered.
- 5 The notification obligation does not apply to the supply of commercial residential premises or in relation to potential residential land, where the purchaser is registered for GST and acquires the land for a creditable purpose: s 14-255(2).
- 6 See GSTD 2006/3 regarding types of settlement adjustments taken into account by supplier in determining the consideration for the supply.
- 7 If the parties are associates and no consideration is provided, the withholding amount must be paid to the ATO on the day the supply is made: s 14-250(4)(a)(ii).
- 8 See ATO factsheet at [www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding--Impacts-on-foreign-and-Australian-residents/?anchor=Payingthewithholding#Payingthewithholding](http://www.ato.gov.au/General/Capital-gains-tax/In-detail/Calculating-a-capital-gain-or-loss/Capital-gains-withholding--Impacts-on-foreign-and-Australian-residents/?anchor=Payingthewithholding#Payingthewithholding).
- 9 This is subject to the 'honest and reasonable mistake' defence: s 9.2 *Criminal Code*.
- 10 This administrative offence is subject to the defence that at the time the vendor gave the notice stating that no withholding is required, the vendor reasonably believed that it was not required to meet the requirements in s 14-255(1)(b): s 14-255(7).
- 11 The purchaser is not required to make any additional enquiries about the premises or land but is only unable to rely on a notice provided by the vendor if information the purchaser is already aware of contradicts it or calls it into question: para 1.51, 2018 Act Explanatory Memorandum.
- 12 In the ATO publication LCR 2018/D1 (which was still in draft at the time of writing), the ATO has indicated that a purchaser should keep evidence (such as photocopy of the cheque) that it provided the bank cheque to the vendor, of the purchaser's direction to pay the cheque to the ATO and of correspondence from the vendor showing receipt of the bank cheque.