



THE LAW SOCIETY  
OF NEW SOUTH WALES

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General Manager  
Corporate and International Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [taxlawdesign@treasury.gov.au](mailto:taxlawdesign@treasury.gov.au)

Dear Sir/Madam

### **Foreign Resident Capital Gains Withholding Tax**

The Property Law Committee ("Committee") of the Law Society of New South Wales has reviewed the Exposure Draft Tax and Superannuation Laws Amendment (2015 Measures No. 5) Bill 2015: Foreign resident capital gains withholding payments ("Draft Bill") and the Exposure Draft Foreign Resident CGT Withholding Regime Explanatory Materials ("Draft Explanatory Materials"). These documents implement the Foreign Resident Capital Gain Withholding Tax proposal issued by Treasury on 8 July 2015 ("proposed tax measure").

#### **1. The proposed tax measure**

The Committee has serious concerns about the impact of the proposed tax measure and queries whether the existing revenue leakage from unpaid foreign resident capital gains tax justifies the significant red tape that it imposes. The Committee considers that the proposed tax measure will impede the smooth operation of transactions in the property market and has the potential to distort the property market.

The liability of the vendor, foreign or otherwise, to pay capital gains tax upon the sale of an asset is wholly the responsibility of the vendor. The Committee is concerned that the proposed tax measure will give rise to additional significant compliance costs for all parties to a transaction and may expose a purchaser to serious penalties where the liability to pay any capital gains tax should be a matter for the vendor.

#### **2. Real property that is subject to the proposed tax measure**

The Committee notes that the proposed tax measure will not apply to transactions involving residential property valued at less than \$2.5 million. The Committee notes that the threshold of residential property at \$2.5 million will be reached more commonly in the Sydney metropolitan area than in other parts of Australia, given the current state of the property market in Sydney.

The Committee also notes that all vacant land will be affected by the proposed tax measure and suggests consideration be given to applying a monetary threshold for its application to vacant land. The Committee considers the compliance burden imposed on parties to, for example, the sale of a block of land of a size and with a zoning suitable for a single dwelling house located in a regional centre, manifestly outweighs any risk to the revenue.

The Committee understands that transfers or assignments of leases will also be subject to the proposed tax measure. The Committee queries the need for the proposed tax measure to extend to the transfer or assignment of leases and notes that this may easily be circumvented by the relevant parties simply entering into a new lease rather than transferring an existing lease. The Committee suggests that consideration could be given to limiting its application to long term leases only, being leases for terms of not less than 25 years, including options to renew.

### **3. Purchaser must be able to rely upon a declaration by the vendor in the contract for sale of land**

In the Committee's view, if the proposed tax measure is to be introduced, it is essential that a purchaser is entitled to rely, without more, upon a declaration by the vendor in the contract for sale of land that the proposed tax measure does not apply. The purchaser should not be under any obligation to make further enquiries. In the absence of actual knowledge that the declaration made in the contract is false, the purchaser's obligations are satisfied.

The Committee notes that pursuant to section 14-210(2) of the Draft Bill, the obligation to remit the withholding payment does not apply where the vendor provides the necessary declaration under section 14-220 of the Draft Bill and the purchaser does not know the declaration to be false. On the face of the drafting, this appears to exclude any concept of constructive knowledge being imposed upon the purchaser, which is appropriate in the Committee's view. Any attempt to import concepts of constructive knowledge or to require a purchaser to carry out due diligence as to the residency status of the vendor is strongly opposed.

### **4. Amount of withholding payment**

The Committee suggests that simplification of section 14-200(3)(a) of the Draft Bill should be considered. The section currently describes the amount to be paid to the Commissioner as "10% of the first element of the \*CGT asset's cost base just after the \*acquisition". As it is a withholding amount only, the calculation should be simple and easily ascertainable by the parties. The Committee suggests the withholding payment should simply be 10% of the price, giving the parties certainty and leaving no possibility of disagreement or the need for further calculations. The price would be the sale price as shown on the front of the contract, inclusive of GST, if any, and without adjustments (such as the adjustment of council rates and water rates).

### **5. Time frame for variation request and response**

In New South Wales, the standard period provided for settlement in a contract for the sale of land is 42 days. Settlement may, of course, be shorter or longer as the parties require as specified in the contract. The Committee is concerned that the variation notice mechanism contemplated by the ATO, which is referred to in section 14-225 of the Draft Bill, may be problematic for the standard settlement period in New South Wales.



The Committee understands that the vendor prepares a Variation form, to which the ATO responds in accordance with section 14-225 of the Draft Bill, by way of varying the amount, including reducing the amount payable to nil. It is important that this form be as simple and brief as possible. The Committee has been provided with an early draft of such a Variation form and has concerns as to the ability of a vendor to complete such a lengthy form in a timely and accurate manner.

In gauging the impact of the proposed tax measure in relation to conveyancing practice in NSW, it would be very useful to know the expected time frames for the ATO to deal with requests for variation of the amount payable. If it is likely that it will take more than four weeks to respond to such requests for variation (allowing for the likelihood that an application will not be made until after exchange and a response would be needed well before settlement), the mechanism will be creating unnecessary administration, red tape, uncertainty, compliance costs and an unrealistic expectation that the matter can be properly dealt with in time for settlement. This may cause delay to the settlement actually occurring, with additional costs and inconvenience to the parties, particularly a purchaser.

The Committee is also concerned about the practical effect of receiving a variation from the ATO after settlement figures and cheques have already been arranged for settlement. It is easily foreseeable that the vendor would then be seeking that the purchaser and any incoming mortgagee urgently redraw the cheques for settlement, causing unnecessary angst and costs for all parties.

#### **6. Issues where the bulk of settlement funds are required to pay out a mortgage of the property being sold**

The Committee also envisages that the proposed tax measure may create particular problems where the asset is mortgaged and the mortgagee is expecting the majority of proceeds on settlement. The Committee suggests further consideration needs to be given to this not uncommon scenario. The Committee notes that example 1.5 of the Draft Explanatory Materials deals with such a scenario, but the suggested solution of the vendor making "other commercial arrangements acceptable to the bank" does little to recognise the real difficulty faced by a vendor in such a situation.

#### **7. Time frame for remittance**

The Committee notes that section 14-200(2) of the Draft Bill requires the purchaser to pay the withholding amount to the Commissioner for Taxation "on or before the day when you become the \*CGT asset's owner".

The Committee notes that example 1.8 of the Draft Explanatory Materials contains an example where the settlement date is the date upon which the remittance to the Commissioner must be made, rather than the date the purchaser is registered as the owner.

The Committee has concerns with the obligation to remit payment being either the date upon which the purchaser is registered on the title (the point in time at which a purchaser "becomes the owner" under the Torrens system) or the date upon which settlement occurs. Registration on title may occur well after the date of settlement and can be a matter of weeks or even months after settlement has occurred. In cases where the purchaser's mortgagee or agent attends to registration, the actual date of registration will not be known by, nor within the control of, the purchaser or its solicitor.



An obligation to remit funds on the day of settlement is very inflexible and will not always be possible. For example, if the settlement is conducted by a city agent on behalf of the purchaser's solicitor, the settlement cheques (including a cheque drawn payable to the Commissioner for Taxation for the withholding payment) will need to be sighted by the vendor at settlement and then returned by post overnight from the agent to the purchaser's solicitor for dispatch the following day.

In the Committee's view, it may be more appropriate to require the purchaser to remit the funds to the Commissioner of Taxation within 14 days of the date of settlement.

## **8. Method of remittance**

The Committee is also concerned that the method of remittance to the Commissioner of Taxation is unclear. Where the settlement occurs in a paper environment, the usual approach would be that a cheque would be drawn on settlement in favour of the Commissioner of Taxation, which would then be remitted to the Commissioner following settlement. However the Draft Explanatory Materials refer in paragraph 1.101 to electronic payment only, such as electronic funds transfer or BPAY. The Committee notes that paragraph 1.102 of the Draft Explanatory Materials refers to the Commissioner possibly allowing alternate means of payment in some circumstances and the Committee urges some further consideration be given to the means of payment and how this may work with existing conveyancing practices and commonly used methods of remitting amounts to third parties following settlement. If deposit to a specific ATO tax account was provided as an option, would the obligation to remit be satisfied upon making the deposit?

The Committee notes that the form of payment required seems consistent with arrangements that can be made for third party payments through electronic conveyancing. However at this stage, the majority of conveyancing transactions in New South Wales occur through the paper environment and that is likely to continue for several years.

Another issue for both the vendor and the purchaser, irrespective of the manner of remittance used, will be the procedures used by the ATO to identify withholding payments made and correctly assign the payment to the particular vendor and the particular asset being sold. The Committee would be pleased to see this and other forms that may be developed to further gauge the practical impact of the proposed tax measure. The Committee is also concerned with the compliance burden being imposed upon the purchaser in requiring it to register for the purpose of making the remittance.

## **9. Commencement of the proposed tax measure**

In the Committee's view, the proposed tax measure should only apply to contracts or leases entered into on and after the commencement date. The Committee notes that Part 2 item 23 in the Draft Bill, when read with s109.5 of the *Income Tax Assessment Act 1997* (in particular CGT event numbers A1, D2, F1 and F2) appears to achieve that outcome. However for simplicity's sake, the Committee suggests that this important aspect of the proposed tax measure should be expressly stated in the Draft Bill itself, rather than cross-referencing Division 109 of the *Income Tax Assessment Act 1997*.

The Committee understands that the proposed tax measure is likely to commence on 1 July 2016. However given the significant practical issues yet to be resolved in relation to the measure, the Committee suggests consideration be given to deferring the proposed commencement date to 1 July 2017. Important changes will also need to be made to



conveyancing practice and standard documentation, such as the contract for sale of land, requiring sufficient time for implementation and education.

#### **10. Business Law Committee comments**

The Law Society's Business Law Committee ("BLC") notes that the issue of non-cash transactions (e.g. sale of share / property swap) has not been adequately dealt with in the Draft Bill. The issue of determining the extent of the purchaser's obligations and how to satisfy these obligations when there is no cash payment is unclear. It may not be possible for a purchaser to convert 10% of the non-cash consideration into cash, if the consideration is not divisible or difficult to value. As well as potentially imposing unduly onerous obligations on a purchaser in such circumstances, it may lead to the artificial distortion of transactions to take account of the new regime.

The BLC also agrees that the time frame for remittance is problematic. In practice, in many sale transactions parties adjust the price after settlement, which may be subject to final valuations. There is no mechanism for adjustment, other than the vendor lodging a return. The BLC does not consider that this issue is adequately addressed by the examples included in the Draft Explanatory Materials. Further investigation as to the practical impact of the obligation to make the withholding on the day of settlement is imperative to address issues of practicality and implementation.

The BLC is very concerned that the issues outlined in this submission as a whole, will increase "red tape" and compliance costs for all parties and add to the expense of standard commercial and transactional practice.

#### **11. Conclusion**

The Committee is pleased to have the opportunity to comment on the proposed tax measure. Should you have any queries about this submission, please contact Gabrielle Lea, Policy Lawyer for the Property Law Committee by phone to (02) 9926 0375 or by email to [gabrielle.lea@lawsociety.com.au](mailto:gabrielle.lea@lawsociety.com.au).

Yours faithfully,

A handwritten signature in black ink, appearing to read "John F Eades", written in a cursive style.

John F Eades  
**President**