



Leaker Partners
Corporate and Commercial Lawyers

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FROM THE BACK

New Solicitor

Leaker Partners is thrilled to announce the appointment of Sean Gomes as a commercial solicitor to the practice. Sean Gomes has joined the firm in May 2016 and provides support to the senior practitioners.

Sean graduated from the University of Western Australia with a Bachelor of Laws and Bachelor of Commerce in 2013 and was admitted as a lawyer in 2014.

Sean will be advising in the areas of property and acquisitions.



Commercial Leases Breakfast Seminar

Victoria Brasted will be presenting our latest breakfast seminar on Commercial Leases on 22 June 2016. The details are as follows:

Date: 22 June 2016 at 7:30am

Venue: The Western Australian Club, Level 11, 12 St Georges Terrace, Perth WA 6000



For more information, or if you are interested in attending, please contact Leaker Partners at reception@leakerpartners.com.au or on (08) 9324 8590.

Buyer beware – Purchasers required to withhold amounts for certain property purchases

- From 1 July 2016, purchasers must retain 10% of the purchase price and remit to the ATO.
- Applies to taxable Australian property valued at \$2 million or more (including real property – land and buildings). Some exceptions apply.
- Vendor may not receive full purchase price unless they supply a clearance certificate or vendor's declaration, proving they are not a foreign resident.
- Penalties apply to purchasers who fail to retain the 10% when required to do so.
- Measure is implemented to stop foreign resident vendors escaping their capital gains tax liabilities on sale of real property and other assets.
- Read on for more information...

From 1 July 2016, where a foreign resident sells taxable Australian property with a market value of at least \$2 million, the *purchaser* will be required to withhold and pay to the Australian Taxation Office (ATO) 10% of the purchase price.

The regime will apply where:

- the property is purchased or the contract is entered into on or after 1 July 2016;
- at least one of the vendors is a foreign resident at the time of the transaction; and
- the asset or interest is of a certain type.



The purpose of the measure is to assist the ATO in cracking down on foreign residents evading their capital gains tax liabilities. The applicable legislation is the *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016*.

Australian property subject to the regime

The taxable Australian property that will be subject to the regime includes:

- all real property situated in Australia – this includes land, buildings, residential and commercial property and includes leases;
- mining, quarrying and prospecting rights;
- indirect Australian real property interests (that is, a membership interest of 10% or more in an entity whose underlying value is principally derived from Australian real property); and
- options or rights to acquire any of the above.

Exceptions

Certain exceptions apply, including where:

- the market value is under \$2 million (based on the purchase price in an arm's length transaction);
- the transaction is on an approved stock exchange; or
- the vendor is subject to formal insolvency or bankruptcy proceedings.

Whether vendor is a foreign resident

Intriguingly, *all* vendors of taxable Australian real property will automatically be deemed to be foreign residents. A vendor is also considered to be a foreign resident if the purchaser:

- Knows or reasonably believes that the vendor is a foreign resident; or
- Does not reasonably believe that the vendor is an Australian resident, and the purchaser:
 - Has a record showing the vendor has an address outside Australia; or
 - Is authorised to provide a related financial benefit to a place outside Australia.

For instance, if the vendor:

- lists an address outside Australia in the contract of sale; or
- directs that payment be made to an offshore bank account,

the purchaser should assume the vendor is a foreign resident.

A vendor is only excluded from the definition of a foreign resident if they provide the purchaser with either:

- a 'clearance certificate' (in the case of taxable Australian real property); or
- a 'vendor declaration' (in any other case).

Clearance certificate

- In order to receive the full price at settlement, the vendor must provide the purchaser with a clearance certificate. If the clearance certificate is provided on or before settlement, the purchaser is not required to withhold the 10%.
- The clearance certificate confirms the vendor's Australian residency status.
- Foreign resident vendors cannot obtain a clearance certificate.
- The clearance certificate is obtained by applying to the ATO. The vendor must provide their tax file number, residency status and details of the acquisition.
- The application can be made at any time during consideration of selling the property, including before the property is listed for sale.
- The certificate is valid for 12 months.

Vendor declaration

- For assets other than taxable Australian real property, a vendor can themselves provide the purchaser with a vendor declaration.
- If the vendor declaration is provided on or before settlement, the purchaser is not required to withhold the 10%.
- There are 2 types of vendor declarations:
 1. A declaration that the vendor is an Australian resident; and
 2. A declaration that the asset being disposed of is not an indirect Australian real property interest.
- A vendor declaration is valid for 6 months from the date it is made.

Variations

- Foreign resident vendors may apply for a variation to lower the withholding rate. This includes a variation to nil.
- A variation can be applied for where the 10% withholding is considered inappropriate. For example, where the vendor will not make a capital gain on the sale.
- The vendor must provide relevant evidence substantiating the claim.
- The application will be assessed by the ATO on a case-by-case basis.
- The application could take some time to be assessed. Thus, applications should be made well in advance of the sale.

Paying and reporting withholding amounts

- Where a withholding obligation exists, the purchaser must pay the withholding amount (that is, 10% of the purchase price) to the ATO at settlement.
- The purchaser is also required to complete a 'Purchaser Remittance Form' and provide to the ATO details of the vendor, purchaser and the asset acquired.
- The foreign resident vendor can then claim a credit from the ATO for the amount of withholding tax paid by the purchaser (provided it has been paid), upon lodgement and assessment of an income tax return.

Penalties for non-compliance

- A failure to comply with the regime is a criminal offence and attracts a penalty. There is a further penalty applied equal to the amount required to be withheld.
- Making a false vendor declaration also attracts a penalty.
- It is important to remember that, ultimately, the purchaser will be liable for the full withholding amount if it is required to withhold and remit the 10% and fails to do so.
- In other words, the ATO will pursue the purchaser for a liability that originated with the vendor.

Ramifications

- There are obvious ramifications to purchasers and vendors of taxable Australian property.
- Purchasers should find out whether they will be required to withhold the 10%.
- Vendors should organise the necessary clearance certificates, vendor declarations or variation applications as appropriate
- The regime will also affect creditors that hold a security interest over a relevant Australian asset of the vendor. For example, in the case of a mortgage, the mortgagee would be required to permit the buyer to withhold 10% of the settlement proceeds. This might mean the proceeds of the sale are insufficient to discharge the creditor's debt. In those circumstances, the creditor might be advised to apply for a variation.
- The legislative framework is so broad that it will likely impact every sale of Australian real property, other than most residential property.
- You should consider obtaining legal advice if it is likely that a transaction you enter into will be captured by the regime.

Leaker Partners advises on the purchase and sale of commercial property and taxable Australian property generally. If you would like advice on how the legislative amendments may affect you, please contact us on (08) 9324 8590 or info@leakerpartners.com.au