



Leaker Partners
Corporate and Commercial Lawyers

***FOREIGN RESIDENT
CAPITAL GAINS
WITHHOLDING REGIME***

***WA Club
31 August 2016***

Sean Gomes
Solicitor
Leaker Partners
E: sean.gomes@leakerpartners.com.au
T: 9324 8590
August 2016



WHAT IS THE REGIME?

- **A non-final withholding obligation for acquirers of ‘taxable Australian property’ of \$2 million or more from ‘foreign residents’**
- **Purchaser must withhold and pay to ATO 10% of purchase price**
- **Contracts entered into after 1 July 2016**





WHAT IS THE REGIME? (cont'd)

- **All vendors are automatically deemed to be a 'foreign resident' – even 'Australian residents'**
- **Some exceptions apply**
- **Clearance certificates, vendor declarations and variations**



WHICH ASSETS ARE CAPTURED?

- **Taxable Australian Real Property (TARP):**
 - real property situated in Australia (including a lease);
 - a mining, quarrying or prospecting right where the material is situated in Australia
- **Indirect Australian real property interest (IARPI):**
 - Non-portfolio share holdings in entities whose assets are predominantly land
- **Option or right to acquire TARP or IARPI**
- **‘Purchase price’ (first element of the CGT asset’s cost base just after acquisition) of \$2 million or more**



EXCEPTIONS

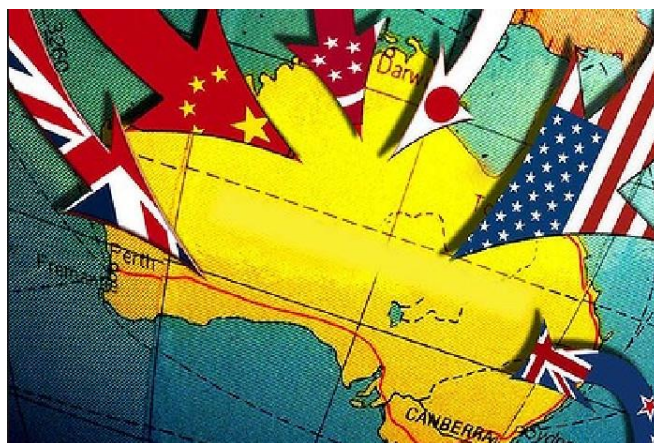


- **Market value = under \$2 million (based on the purchase price in an arm's length transaction);**
- **Approved stock exchange or through a crossing system;**
- **Subject to another withholding obligation;**
- **Securities lending arrangements; or**
- **Vendor subject to formal insolvency, external administration or bankruptcy proceedings**



WHO IS A FOREIGN RESIDENT?

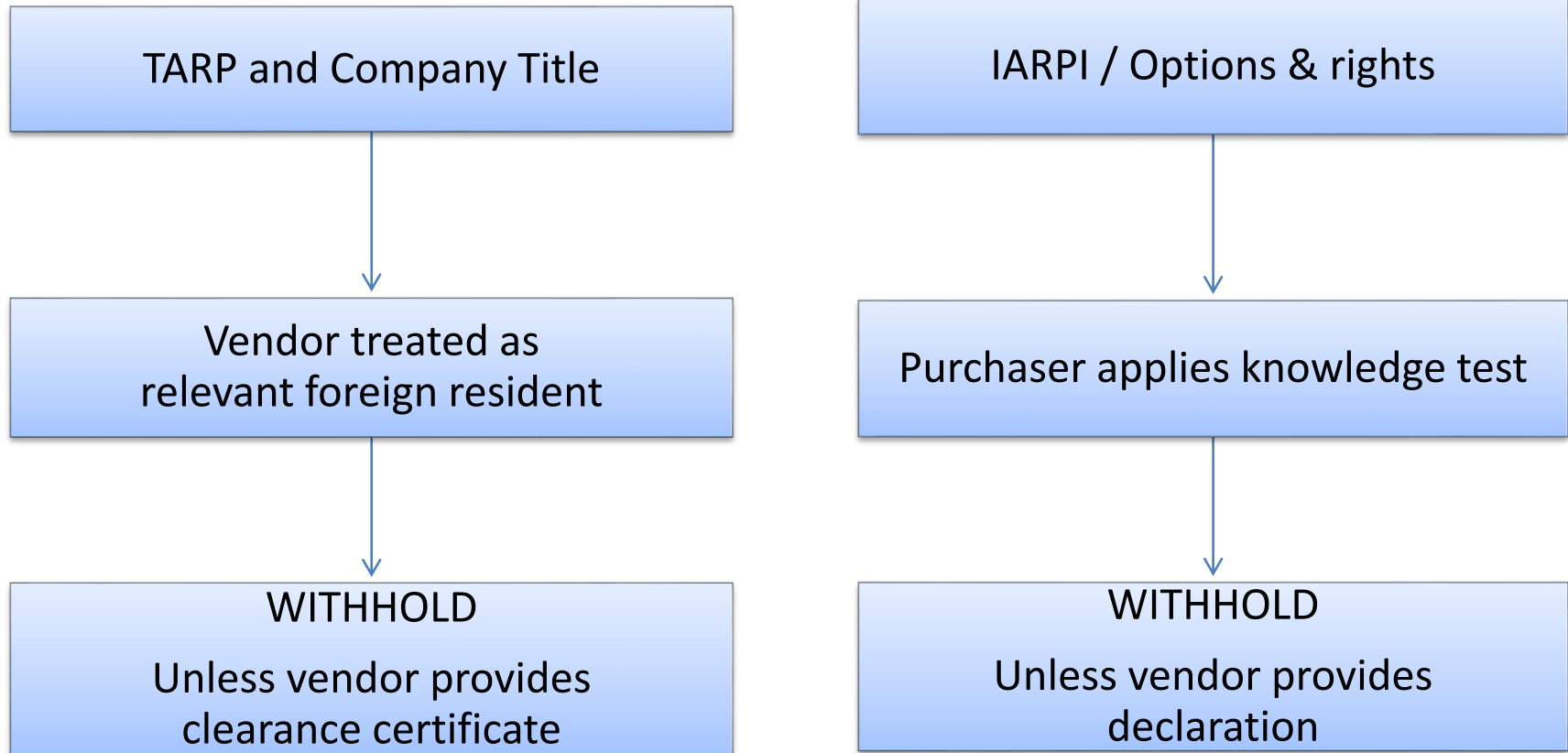
- All vendors of TARP or IARPI the holding of which causes a company title interest – vendor treated as a foreign resident
- For IARPI and options and rights – purchaser applies knowledge test:
 - You know or reasonably believe that the entity is a foreign resident; or
 - You do not reasonably believe that the entity is an Australian resident, and either:
 - The entity has an address outside Australia; or
 - You are authorised to provide a related financial benefit to a place outside Australia



WHO IS A FOREIGN RESIDENT? (cont'd)



Leaker Partners
Corporate and Commercial Lawyers



CLEARANCE CERTIFICATE



Leaker Partners
Corporate and Commercial Lawyers

- For TARP, in order to receive 100% of the purchase price, vendor must provide purchaser with a clearance certificate
- Clearance certificate confirms vendor's Australian residency status
- Application must be made to the ATO – provide TFN, residency status and details of the acquisition
- Apply at any time during process of selling property
- Valid for 12 months
- Apply here → https://www.ato.gov.au/FRWT_Certificate.aspx



VENDOR DECLARATION



Leaker Partners
Corporate and Commercial Lawyers

- For assets other than TARP, vendor can provide purchaser with a vendor declaration
- If provided before settlement, purchaser not required to withhold 10%
- 2 types of declarations:
 - Vendor is an Australian resident; and
 - Asset being disposed of is not an IARPI
- Valid for 6 months



VARIATION



Leaker Partners
Corporate and Commercial Lawyers

- **Variation to lower the withholding rate (includes a variation to nil)**
- **Can be applied for where the 10% withholding rate is inappropriate**
- **Vendor must provide relevant evidence substantiating the claim**
- **ATO assesses applications on a case-by-case basis**
- **Apply here → https://www.ato.gov.au/frcgw_variation.aspx**



PAYING AND REPORTING WITHHOLDING AMOUNTS



Leaker Partners
Corporate and Commercial Lawyers

- Where the withholding obligation exists, purchaser must pay the withholding amount (10% of purchase price) to the ATO at settlement
- Purchaser also completes a 'Purchaser Remittance Form'
- Vendor claims a credit from the ATO upon lodging tax return
- Penalty for non-compliance – becomes purchaser's problem



POTENTIAL ISSUES



Leaker Partners
Corporate and Commercial Lawyers

- **Time taken to obtain clearance certificate**
- **Non-arm's length transactions**
- **Amount paid to creditor insufficient to discharge mortgage or other security interest**
- **\$0 consideration (e.g. transfers due to Family Court order or transmission of assets of deceased estate)**
- **ATO audit/investigation triggered**





Leaker Partners
Corporate and Commercial Lawyers

THANK YOU

