

The Senate

Economics
Legislation Committee

Treasury Laws Amendment (Foreign Resident
Capital Gains Withholding Payments) Bill
2017 [Provisions]

June 2017

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Inquiry into the provisions of the Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Bill 2017

Referral and conduct of the inquiry

1.1 On 10 May 2017, the Senate agreed that:

- (1) To ensure appropriate consideration of time critical bills by Senate committees, the provisions of all bills introduced into the House of Representatives after 11 May 2017 and up to and including 1 June 2017 that contain substantive provisions commencing on or before 1 July 2017 (together with the provisions of any related bill) are referred to committees for inquiry and report by 13 June 2017.
- (2) The committee to which each bill is referred shall be determined in accordance with the order of 31 August 2016, allocating departments and agencies to standing committees.
- (3) A committee to which a bill has been referred may determine, by unanimous decision, that there are no substantive matters that require examination and report that fact to the Senate.
- (4) This order does not apply in relation to bills which contain:
 - (a) no provisions other than provisions appropriating revenue or moneys (appropriation bills); and
 - (b) commencement clauses providing only for the legislation to commence on Royal Assent.¹

1.2 Accordingly, following its introduction into the House of Representatives on 1 June 2017, the provisions of the Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Bill 2017 were referred to the Economics Legislation Committee for inquiry and report.

1.3 The committee advertised the inquiry on its website, and wrote directly to a range of individuals and organisations inviting written submissions. The committee received three submissions, which are listed at Appendix 1. The committee thanks all groups and individuals who took the time to make a written submission.

1.4 The committee did not hold any public hearings for the inquiry.

1 *Journals of the Senate*, No. 40, 10 May 2017, p. 1326.

Overview of the bill

1.5 The bill seeks to amend the *Taxation Administration Act 1953* (TAA 1953) to modify the foreign resident capital gains withholding payments regime to:

- increase the withholding rate to 12.5 per cent (currently 10 per cent); and
- reduce the withholding threshold to \$750,000 (currently \$2 million).

1.6 The proposed measure will apply in relation to acquisitions of property that occur on or after 1 July 2017.²

1.7 The proposed measure was announced in the government's 2017–18 Budget as part of a range of reforms to reduce pressure on housing affordability. In his second reading speech, the Assistant Minister to the Treasurer, the Hon Michael Sukkar MP, explained that:

By clamping down on tax avoidance by foreign investors in real estate, the government is ensuring home ownership is more achievable for ordinary Australians, and that they have access to secure and affordable housing.³

1.8 In addition, the Assistant Minister to the Treasurer observed that the 'changes will improve the integrity of the existing regime by capturing more property transactions and encouraging greater compliance with Australia's tax rules'.⁴

Current foreign resident capital gains withholding payments regime

1.9 The current foreign resident capital gains withholding payments regime came into effect on 1 July 2016. The regime was introduced to improve the integrity of Australia's foreign resident capital gains tax CGT regime as part of the government's broader efforts to ensure that foreign investors in Australian real property comply with their Australian legal obligations.

1.10 Foreign residents are liable to pay tax on capital gains when they dispose of certain Australian assets; broadly, direct and indirect interests in real property. At the time the original legislation was introduced, the Minister observed that the Australian Taxation Office (ATO) had indicated that voluntary compliance with Australia's foreign residents CGT regime was low. In addition, there were difficulties in the ATO undertaking effective compliance activity after a transaction takes place, given the funds would likely be offshore and the foreign resident may otherwise have little connection to Australia.⁵

2 Explanatory Memorandum, p. 3.

3 The Hon Michael Sukkar MP, Assistant Minister to the Treasurer, *House of Representatives Hansard*, 1 June 2017, p. 20.

4 The Hon Michael Sukkar MP, Assistant Minister to the Treasurer, *House of Representatives Hansard*, 1 June 2017, p. 20.

5 The Hon Alex Hawke MP, Assistant Minister to the Treasurer, *House of Representatives Hansard*, 3 December 2015, p. 14640.

1.11 In order to address this, the foreign resident capital gains withholding payments regime assists the collection of foreign residents' Australian tax liabilities. It imposes an obligation on purchasers to withhold 10 per cent of the purchase price and pay it to the ATO, where a vendor enters into a contract on or after 1 July 2016 and disposes of certain asset types (or receives a lease premium for the grant of a lease over Australian real property).

1.12 Under the current regime, Australian resident vendors selling real property are required to obtain a clearance certificate from the ATO prior to settlement, to ensure they do not incur the 10 per cent non-final withholding. The regime currently applies to taxable Australian real property with a market value of \$2 million or more.⁶

Administration and education campaign

1.13 Additional funding of \$19 million over the forward estimates will be provided to the ATO to assist with administering the foreign resident capital gains tax regime.⁷

1.14 The Assistant Minister to the Treasurer, the Hon Michael Sukkar MP, reported that the ATO is undertaking an education campaign to help raise awareness of the changes to the regime. The education campaign includes:

...presentations in major Australian cities, an online webinar and collaboration with stakeholders that assisted to raise awareness when the regime was first introduced, including the Real Estate Institute of Australia, the Australian Institute of Conveyancers, law societies, and various state and territory regulators.⁸

Consultation

1.15 Treasury advised that it has liaised with a number of stakeholders since the changes to the foreign resident CGT withholding regime, which this bill seeks to introduce, were announced in the Budget. Treasury has participated in discussions with the Foreign Investment Reforms Working Group, which includes representatives from: Treasury, the ATO, Chartered Accountants Australia New Zealand, Greenwoods, Deloitte, PricewaterhouseCoopers, King & Wood Mallesons, KPMG, CPA Australia, Property Council of Australia, Australian Bankers' Association, Australian Institute of Conveyancers, Real Estate Institute of Australia, Macquarie

6 Australian Taxation Office, 'Capital gains withholding: Impacts on foreign and Australian residents', last modified 17 May 2017, <https://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/> (accessed 13 June 2017).

7 The Hon Michael Sukkar MP, Assistant Minister to the Treasurer, House of Representatives Hansard, 1 June 2017, p. 20; Commonwealth of Australia, *Budget Measures: Budget Paper No. 2 2017–18*, p. 27.

8 The Hon Michael Sukkar MP, Assistant Minister to the Treasurer, *House of Representatives Hansard*, 1 June 2017, p. 20.

Bank, Australian Financial Markets Association, Ashurst, Holding Redlich, and BDO Australia.⁹

Financial impact

1.16 The revenue implications of the proposed measure, together with the associated measures relating to CGT changes for foreign investors that were announced as part of the 2017–18 Budget, over the forward estimates period is set out in below in Table 1.¹⁰

Table 1: Financial impact (as set out in Explanatory Memorandum)

<i>2016–17</i>	<i>2017–18</i>	<i>2018–19</i>	<i>2019–20</i>	<i>2020–21</i>
*	\$150m	\$100m	\$150m	\$170m

1.17 The Explanatory Memorandum notes:

...the revenue gain over the forward estimates has been updated since the 2017–18 Budget announcement to reflect a minor policy change to the associated measure that will ensure only Australian tax residents can access the main residence exemption.¹¹

Stakeholder views on the bill

1.18 The committee received submissions from the Real Estate Institute of Australia (REIA), the Electronic Conveyancing Group (ECG) (on behalf of the Australian Institute of Conveyancers and the Law Council of Australia), and the Australian Institute of Conveyancers. Both submissions expressed concerns regarding the change to the threshold from \$2 million to \$750,000 and the proposed date of effect of the measure, 1 July 2017.

Changing the capital gains tax threshold for foreign residents

1.19 The REIA is the national professional association for Australia's real estate sector. REIA expressed the view that the new threshold was 'unnecessarily low and means that agents and conveyancers will be subject to additional red tape and costs for no valid reason'.¹²

1.20 REIA explained that, based on data from the 2015–16 Foreign Investment Review Board Annual Report, the proposed \$750,000 threshold 'means that half the properties sold in Melbourne and Sydney will be subject to the withholding provisions yet foreign investors are buying properties at double this value'.¹³ As such, REIA

9 Treasury, Answers to questions on notice, received 9 June 2017, pp. 1–2.

10 Explanatory Memorandum, p. 3.

11 Explanatory Memorandum, p. 3.

12 Real Estate Institute of Australia, *Submission 1*, p. 1.

13 Real Estate Institute of Australia, *Submission 1*, p. 1.

considers that the proposed \$750,000 is 'unjustifiable', and argued that, if the threshold were to be reduced, it should be no less \$1.5 million.¹⁴

1.21 The Australian Institute of Conveyancers, the national peak body representing licenced and registered conveyancers, also raised concerns about the effect of changing the threshold. It observed that:

The new threshold of the measure disadvantages conveyancers in the market place, exposes them to significant risk of not being able to meet their obligations to their clients and increases red tape and the compliance burden which cannot be passed on to their client.¹⁵

1.22 In addition, the Australian Institute of Conveyancers sought assurances that the ATO will be adequately staffed to support the anticipated change in workload as a result of this measure, in order to ensure that property settlements are not disrupted.¹⁶

1.23 ECG noted that while it appreciates the obligation for government to preserve the integrity of its revenue base, it remains very concerned that the proposed reduction of the threshold 'creates compliance and regulatory obligations upon the vast majority of participants in transactions which do not involve a foreign investor sale'.¹⁷

1.24 ECG observed:

The previous threshold was designed to regulate the sale of premium residential properties, or commercial properties, where advisors are skilled, familiar and capable of providing advice in relation to compliance, and the cost of that advice can be appropriately absorbed. However, the reduction of the threshold from \$2,000,000.00 to \$750,000.00 effectively changes the underlying premise upon which the legislation is based. Under the proposed new threshold private consumers and small business will primarily be affected.¹⁸

1.25 As such, ECG expressed concern that increased compliance costs and regulations may have an adverse effect on housing affordability. ECG submitted that a cost benefit analysis should be conducted on the proposed change to the threshold.¹⁹

Proposed date of effect

1.26 REIA also raised concerns that the implementation date of 1 July 2017 would provide limited scope for an education campaign. REIA observed that:

When the withholding tax was first introduced it applied to far less property and involved far fewer markets yet far more time was available for the

14 Real Estate Institute of Australia, *Submission 1*, p. 1.

15 Australian Institute of Conveyancers, *Submission 3*, p. 3.

16 Australian Institute of Conveyancers, *Submission 3*, p. 2.

17 Electronic Conveyancing Group, *Submission 2*, p. 1.

18 Electronic Conveyancing Group, *Submission 2*, p. 2.

19 Electronic Conveyancing Group, *Submission 2*, p. 2.

REIA to work with the ATO in educating agents. This isn't simply a case of letting agents know of a new threshold. There are a whole new set of agents in additional markets involved. A delay by 6 months would be more appropriate and introducing it part way through a financial year should be acceptable as the withholding tax was first introduced in the middle of a financial year.²⁰

1.27 ECG noted that its members had raised concerns about the timing of the proposed implementation date of the measure in terms of the need to make transitional arrangements, including resourcing and logistic issues associated with a substantial increase in the requirements for issuing of clearance certificates. ECG considered that the proposed change should be delayed as the government had underestimated the initial ongoing compliance cost to the community.²¹

1.28 The Australian Institute of Conveyancers supported a minimum six month delay beyond 1 July 2017 in order to ensure:

- a. The compliance cost on small business is fully considered
- b. A resolution to the restrictions of completing the forms is achieved
- c. A thorough cost benefit analysis based on the ATO data from the first year of the measure be undertaken.
- d. There are measures in place for a course to be undertaken for conveyancer's to be authorised tax agents for the sole purpose of completing required forms to facilitate the lodgement of forms.
- e. ATO provides an assurance of an acceptable timeframe of issuing a clearance certificate considering manual processes will be required to process all applications lodged by conveyancers if the current restrictions remain.²²

1.29 In addition, ECG expressed concern that the bill as drafted may have retrospective effect, and were worried about the consequences if the legislation is not in force on 1 July 2017.²³

20 Real Estate Institute of Australia, *Submission 1*, p. 1.

21 Electronic Conveyancing Group, *Submission 2*, p. 3.

22 Australian Institute of Conveyancers, *Submission 3*, p. 3.

23 Electronic Conveyancing Group, *Submission 2*, p. 3.

Committee view

1.30 Housing affordability is a significant issue for many Australians. The bill seeks to implement a modification of the foreign resident capital gains withholding payments regime as part of a range of reforms to reduce pressure on housing affordability. In doing so, the government is ensuring home ownership is more achievable for ordinary Australians, and that they have access to secure and affordable housing.

1.31 The committee notes the concerns raised by the REIA, ECG and the Australian Institute of Conveyancers that the changes to the threshold will capture a much greater number of property transactions. However, the committee notes the intention of the bill is capture more property transactions and in doing so, encourage greater compliance with Australia's tax rules and improve the integrity of the existing regime.

1.32 The committee also notes the concerns raised by submitters with regard to the date of effect. The committee understands that additional funding will be provided to the ATO to assist with administering the regime, including an education campaign to help raise awareness of the changes.

1.33 It is the committee's view that the bill represents an important step in improving housing affordability and strengthening the integrity of the Australian tax system.

Recommendation 1

1.34 The committee recommends that the bill be passed.

**Senator Jane Hume
Chair**

Additional Comments by Labor Senators

1.1 Labor Senators are supportive of this bill but wish to make some points about details of the bill and the Government's budget measures to address housing affordability.

1.2 Labor Senators have confirmed through the inquiry process that there has been a policy change. The original measure as announced on budget night stated that foreign and temporary tax residents would be denied access to the CGT main residence exemption.

1.3 The clarification to state that Australian tax residents (including temporary tax residents that are also an Australian tax resident) can access the main residence exemption is welcome. However, this is not how policy process should be run. A competent Government would have worked through these impacts before making the announcement on budget night. A competent Government would not have created confusion in the community.

1.4 This measure is an integrity measure—helping to ensure that foreign residents are paying the correct capital gains tax on property transactions. In that spirit, Labor Senators will support the bill.

1.5 However, to claim that it reduces pressure on housing affordability is a sham. This measure is an integrity measure, and does not increase the taxation level that foreign residents pay on property transactions. This measure will not have any meaningful impact on housing demand and on housing affordability.

1.6 Labelling this measure a 'housing affordability' measure also shows that the Government is clutching at straws. If the Government was serious about housing affordability, it would work with Labor Senators to wind back negative gearing and the capital gains tax discount.

1.7 The Government has effectively waved the white flag on housing affordability.

1.8 Labor is the only party with a plan to increase affordable housing supply and tackle demand issues associated with the most generous tax concessions in the world.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Australian Labor Party, NSW

Appendix 1

Submissions and additional information received

Submissions received

- 1 Retail Real Estate Institute of Australia (REIA)
- 2 Electronic Conveyancing Group (ECG)
- 3 Australian Institute of Conveyancers (AIC)

Answers to questions on notice

- 1 Answers to written questions on notice, received from the Treasury on 9 June 2017

