



Australian Government

Non-final withholding tax on transactions involving taxable Australian property

Discussion Paper
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CONSULTATION PROCESS

REQUEST FOR FEEDBACK AND COMMENTS

Interested parties are invited to lodge written submissions on the issues raised in this paper.

Submissions will be made available on the Treasury website unless you clearly indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

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Closing date for submissions: 28 November 2014

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EXECUTIVE SUMMARY

In the 2013-14 Budget it was announced that from 1 July 2016 a 10 per cent non-final withholding tax will apply to the disposal, by foreign residents, of certain 'taxable Australian property'. The measure will not apply to 'residential property' transactions under \$2.5 million or to disposals by Australian residents. The measure is a collection mechanism to support the operation of the foreign resident capital gains tax regime.

On 6 November 2013 the Government announced that it would proceed with this measure.

Under the measure, the payer in a transaction will have an obligation to withhold 10 per cent of the proceeds payable in relation to the transaction where (i) the payee is a foreign resident, and (ii) the transaction involves an asset that is 'taxable Australian property'.

This discussion paper outlines the proposed design for implementing the non-final withholding tax regime, including options for reducing the compliance burden and red-tape associated with the withholding obligation. This includes options to relieve the payer from the obligation to withhold in certain circumstances.

1. OVERVIEW

1. Australia's current foreign resident capital gains tax ('CGT') regime was introduced in 2006. It replaced the rules that had applied from 1985 when CGT began, which also included Australian real property as part of the foreign resident CGT tax base.¹ Under the current regime foreign residents disregard a capital gain or a capital loss from a CGT event unless the CGT event happens to an asset that is 'taxable Australian property'. This means that foreign residents may have an Australian CGT liability when they enter into transactions involving their 'taxable Australian property'.²
2. Foreign residents may also have an Australian income tax liability when they transact with these assets in circumstances that give rise to a profit which is subject to tax as ordinary income (rather than as a capital gain).
3. In the 2013-14 Budget it was announced that from 1 July 2016 a 10 per cent non-final withholding tax would apply to the disposal, by foreign residents, of certain 'taxable Australian property'. The measure will not apply to 'residential property' transactions under \$2.5 million or to disposals by Australian residents. The non-final withholding tax will apply regardless of whether the gains on disposal are subject to tax under the CGT regime or are subject to tax because the gains constitute ordinary income.
4. The measure is a collection mechanism to support the operation of the foreign resident CGT regime. The withholding tax obligation does not change a foreign resident's existing Australian income tax obligations. Irrespective of whether the non-final withholding tax applies, foreign residents are still required to comply with their Australian income tax obligations.
5. On 6 November 2013 the Government announced that it would proceed with this measure.³
6. Since the Government's announcement last November, initial consultation with business and other stakeholders by the Australian Taxation Office (the 'ATO') has occurred to inform the framework of this paper. This discussion paper is the next step in the consultation process.

1 Division 855 of the *Income Tax Assessment Act 1997* (the 'ITAA 1997').

2 There are five categories of CGT assets that are 'taxable Australian property'. These are set out in the table in section 855-15 of the ITAA 1997. For convenience, this table is included in Appendix 1 to this paper.

3 See Item 9 of the table attached to the press release by the Treasurer titled 'Restoring integrity in the Australian tax system' (6 November 2013).

2. POLICY INTENT

7. The Government welcomes foreign investment into Australia. This investment has many benefits, including supporting existing jobs and creating new employment opportunities for Australians. Foreign investment has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting future economic growth and prosperity.⁴
8. Australia's foreign resident CGT regime is generally consistent with international practice and the approach taken in Australia's modern tax treaties. This consistency helps to promote foreign investment in Australia.⁵
9. It is, however, important that foreign residents investing in Australia comply with Australian law, including their Australian taxation obligations. There can be difficulties in collecting tax from foreign resident taxpayers. This usually occurs where no tax return has been lodged and the taxpayer has little or no other connection to Australia.
10. As announced, the non-final withholding tax will apply to transactions involving the 'taxable Australian property' of a foreign resident, regardless of whether the transaction gives rise to a capital gain or ordinary income.
11. To reduce compliance costs, the measure as announced will not apply to 'residential property' transactions under \$2.5 million. This exemption is not intended to cover vacant land. Although the withholding tax collection rules will not apply to such residential property, the property would still be part of Australia's tax base. In relevant circumstances an Australian tax liability may still arise.
12. In designing the non-final withholding tax regime, Treasury is mindful of the Government's broader deregulation agenda and the importance of minimising red tape and the compliance burden on businesses and individuals.

4 See 'Australia's Foreign Investment Policy 2013' at page 1 (available at this link).

5 See paragraphs 4.5, 4.6 and 4.7 of the Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 4) Bill 2006.

3. DESCRIPTION OF THE MEASURE

13. To give effect to the policy a 10 per cent non-final withholding tax will be imposed where a foreign resident enters into certain transactions involving their 'taxable Australian property'. There are five categories of assets within the meaning of 'taxable Australian property'.⁶ These assets include interests in Australian real property and assets attributable to a place in Australia where a business is carried on.⁷ The withholding tax will not apply to transactions involving an asset which is 'residential property' with a value less than \$2.5 million.
14. There will be an obligation for the payer to withhold an amount equal to 10 per cent of the proceeds from the transaction and pay this amount to the Commissioner of Taxation where:
 - (i) the payee is a 'foreign resident' for Australian income tax purposes;⁸
 - (ii) the transaction involves an asset that is 'taxable Australian property'; and
 - (iii) the asset is not 'residential property' with a value less than \$2.5 million.
15. The obligation to withhold applies irrespective of whether the payee holds a direct or indirect interest in the relevant asset. Also, *prima facie*, the obligation equally applies to foreign resident payers.
16. There are a number of options for determining whether the circumstances detailed above at (i), (ii) and (iii) exist and therefore whether there is an obligation to withhold.
17. The amount withheld is a non-final payment of tax. It will be credited to the account of the foreign resident payee when calculating their final income tax position for the relevant income tax period. This would generally require the foreign resident to have a tax file number and to have lodged a tax return.

6 See the table in section 855-15 of the ITAA 1997.

7 That is, assets attributable to carrying on a business through a permanent establishment in Australia.

8 The term 'foreign resident' is defined for income tax purposes in subsection 995-1 of the ITAA 1997 to mean 'a person who is not a resident of Australia for the purposes of the *Income Tax Assessment Act 1936*'.

4. CONSULTATION ISSUES

18. This section outlines the proposed design for the non-final withholding tax regime on transactions entered into by foreign residents involving 'taxable Australian property'. This section also addresses various matters raised in initial consultation that need to be considered in designing the measure. Treasury seeks your comments on the proposed design and other matters considered in this paper.
19. An overarching objective in the design of the measure is to balance the competing interests of ensuring the sustainability of Australia's revenue system while minimising complexity, red tape and the compliance burden.

4.1 DESIGN AND IMPLEMENTATION OF THE WITHHOLDING TAX OBLIGATION

4.1.1 Identifying if there is a withholding tax obligation

20. Under a withholding tax system there is a requirement for an entity making certain payments to another entity to withhold an amount from those payments. The withheld amount is remitted to the Commissioner. Penalties may apply for failing to withhold when required.
21. Similarly under the current measure, it is intended that the payer should establish, based on the information that is reasonably available to them, whether the payee is a foreign resident, and whether the transaction involves 'taxable Australian property'. This may involve the payer making some enquires in certain circumstances.
22. If, based on their enquiries (or the information that has been provided to them), the payer believes, or has reasonable grounds to believe, that:
 - (i) the payee is a foreign resident, and
 - (ii) the transaction involves an asset that is 'taxable Australian property' (and is not 'residential property' with a value less than \$2.5million)

the payer must withhold an amount equal to 10 per cent of the proceeds payable under the transaction. This is broadly similar to the withholding obligation in respect of other payments to foreign residents currently subject to withholding tax.⁹

23. Whether the payer's enquiries are reasonable will depend on the facts and circumstances of the particular transaction. For example, in a business transaction or similar investment where the payer undertakes a due diligence process, the payer should, as part of that process, determine whether they are likely to have a withholding tax obligation in relation to the transaction.

⁹ Subdivision 12-FB of Schedule 1 to the *Tax Administration Act 1953* (the 'TAA 1953').

24. In a transaction where a due diligence process is not appropriate, the payer may need to take account of other information or circumstances in determining whether the payee is a foreign resident, for example, the payer may:¹⁰
 - identify that the payee has an address which is outside of Australia; or
 - receive a direction to make a payment to a place outside of Australia.
25. In these circumstances, and absent any other factors, it would be reasonable for the payer to believe that the payee is a foreign resident for income tax purposes.
26. The payer must also make enquiries to establish whether the transaction involves an asset that is 'taxable Australian property'. If the asset is real property situated in Australia this enquiry may be relatively straightforward. However, establishing whether a membership interest in an entity constitutes 'taxable Australian property' may require a more targeted enquiry.
27. For example, to identify whether a share in a company constitutes an 'indirect Australian real property interest', will require the payer to have knowledge of the total shareholding of the payee (and its associates) as well as knowledge of the market value of each asset of the company at the relevant time.¹¹

Consultation Questions:

1. Are any circumstances likely to arise that would prevent a payer from making enquiries about whether the payee is a foreign resident for income tax purposes or from identifying reasonable grounds to believe that the payee is a foreign resident for income tax purposes? If so, what are they and how could these issues be addressed?
2. Are any circumstances likely to arise that would prevent a payer from making enquiries in relation to whether the transaction involves an asset that is 'taxable Australian property' or from identifying reasonable grounds to believe that the asset is 'taxable Australian property'? If so, what are they and how could these issues be addressed?
3. In relation to a membership interest that is an 'indirect Australian real property interest' is it reasonable to expect that a payer will be able to identify through due diligence whether the interest passes (i) the 'non-portfolio interest test' or (ii) the 'principal asset test'? If not, why not?
4. Could the ATO provide assistance in determining whether the payee is a foreign resident? If so, what would that be?

¹⁰ See for example, section 12-315 of Schedule 1 to the TAA 1953.

¹¹ See subsection 855-25(1) of the ITAA 1997 — An interest is an 'indirect Australian real property interest' if the interest passes the 'non portfolio interest test' (for example, the payee (and associates) hold 10 per cent or more of the total paid-up share capital of the company at the relevant time) and the interest also passes the 'principal asset test' (that is, its value is derived principally from assets that are 'taxable Australian real property').

5. *Prima facie* the obligation to withhold is on the payer. Are there circumstances where it is more appropriate to place the obligation on another party? If so, what are these circumstances, and who should have the obligation?
6. Are there other circumstances when imposing a withholding obligation would present difficulties? If so, please explain these circumstances.
7. Assuming the measure applies to CGT events that occur on or after 1 July 2016, what issues, if any, need to be considered in relation to transactions commenced prior to that start date but not completed until after that time?

4.1.2 At what time should an amount be withheld from the proceeds?

28. The measure as announced requires the payer to withhold an amount equal to 10 per cent of the proceeds payable in relation to the transaction.¹²
29. Under other withholding regimes in Australia the payer is required to withhold the amount at the time they make the payment to the payee and are then required to pay this amount to the Commissioner at a later time.¹³ For example, where an amount is withheld during a month, the payment may be required by the 21st day of the following month.¹⁴ Similarly, under this measure, the payer will be required to withhold 10 per cent of the proceeds at the time the relevant payments are made and pay this amount to the Commissioner at a later time. This general approach may require adaption where the foreign resident payee is paid by instalments.

Consultation Questions:

8. Where the consideration is payable in instalments, one approach would be to first withhold amounts from instalments until the total withholding obligation has been satisfied (for example, if the first instalment was less than 10% of the total proceeds, the payer would withhold the entire instalment). Are there any difficulties that would arise with this approach? If so, what are they? Is there an alternative approach? If so, what does that approach involve?
9. How should the withholding obligation apply to payments made post completion (for example, adjustments to the purchase price under a performance arrangement)?
10. The amount is normally withheld at the time that the payment is made or credited (for example, at settlement). This raises a question in relation to the time for remitting the withheld amount to the Commissioner: is settlement the appropriate time, or is some other time appropriate?

12 This would include both monetary and non-monetary consideration as well as any contingent consideration that may be payable to the foreign resident payee. This approach is broadly aligned with how the term 'capital proceeds' is currently defined for CGT purposes — see section 116-20 of the ITAA 1997. That definition refers to the value of money and other property received in respect of the CGT event at the time of the event.

13 Section 16-5 of Schedule 1 to the TAA 1953.

14 See subsection 16-75(2) of Schedule 1 to the TAA 1953.

4.1.3 What information should the payer provide to the ATO when remitting an amount withheld?

30. The withholding amount is a non-final payment of tax. As a result it will be credited to the account of the foreign resident payee in determining their final tax position for the relevant income tax period. This means that the payer will need to provide sufficient information to the Commissioner to enable the remitted amount to be credited to the correct payee.
31. The information which may be required to be provided could include:¹⁵
- The details of the 'taxable Australian property'.
 - The date of the transaction.
 - The amount of the proceeds in relation to the transaction (including whether or not payment is made by instalment).
 - The name and address of the foreign resident payee.
 - The foreign resident payee's tax file number ('TFN') Australian Business Number ('ABN'), Australian Company Number ('CAN'), or Australian Registered Body Number ('ARBN') -if available.

Consultation Questions:

11. What impediments are there, if any, that would prevent the payer from being able to provide the Commissioner with the information referred to in paragraph 31? Is the information which may be required to be provided reasonable?
12. To ensure that withholding amounts are credited against the correct account, should there be a requirement for foreign residents to apply for a tax file number when they acquire 'taxable Australian property'?

4.1.4 Exemption for 'residential property'

32. To reduce the compliance burden on people acquiring a residential property, there is a \$2.5 million property value threshold on the withholding obligation where the payee is a foreign resident. It is intended that the exemption should apply to the property when it is valued as a whole: this avoids the complexities of valuing the residential structure separate from the land on which it is situated as well as any other non-residence fixtures. This means that the following three factors are likely to be relevant in determining whether an asset is considered to be 'residential property';

(i) whether the property is zoned for residential use;

(ii) whether it was used, or could be legally used, as a dwelling at the time of sale; and

¹⁵ See subsection 116(5.02) of the *Income Tax Act* (Canada) for an example of the information required to be provided by the payer under the Canadian withholding regime.

(iii) whether the property is vacant land.

33. The term 'residential property' is not currently defined for the purpose of the *Income Tax Assessment Act 1997* or the *Income Tax Assessment Act 1936*. However, the term 'residential property' is defined in other non-tax legislative contexts. For example, the dictionary in Schedule 1 to the *First Home Owner Grant Act 2000 (QLD)* defines the term 'residential property' as follows:

'Residential property' means land in Australia that, at a particular time, has a building on it that is lawfully occupied as a place of residence or is suitable for occupation as a place of residence.

Consultation Questions:

13. What are the issues, if any, that would arise from adopting a definition similar to the term 'Residential property' as defined in the dictionary in Schedule 1 to the *First Home Owner Grant Act 2000 (QLD)*? Are there other definitions that would be more appropriate?

4.1.5 Custodial arrangements

34. Many foreign resident investors hold Australian assets, including assets that are 'taxable Australian property', via an Australian custodian. Under these arrangements the Australian custodian will be the legal owner of the asset and will only deal with the asset as instructed by their client or a duly appointed representative of their client.¹⁶ The client will be the beneficial owner of the asset. While the framework in this discussion paper is premised on the payer (that is the purchaser or transaction counterparty) being required to withhold, custodial arrangements raise the issue of whether it is more appropriate for another entity to withhold in some circumstances.
35. Although an asset may be legally owned by the Australian custodian, any gain on its disposal (and the associated income tax liability) will accrue to the foreign resident client. Given the policy intent discussed earlier, an amount should be withheld from the transaction proceeds in these circumstances.
36. Where an asset that is 'taxable Australian property' is disposed of by an Australian custodian at the direction of their foreign resident client, it may be appropriate for the obligation to withhold to be on the Australian custodian rather than the payer. In practice it may be difficult for the payer to identify whether the Australian custodian's client is a foreign resident. For example, the payer may not have any direct dealing with the client.
37. Where the custodian is a foreign custodian, *prima facie*, the payer will continue to be obliged to withhold.

¹⁶ See page 7 and page 8 of the document titled 'Institutional Investor Services' (2012) prepared by the Australian Custodial Services Association.

Consultation Questions:

14. In circumstances where an asset is held via an Australian custodian, how could a payer identify that the Australian custodian's client (that is the beneficial owner of the asset) is a foreign resident?
15. Would a declaration by either the custodian or the client (similar to the payee declaration 'safe harbour' discussed below under heading 4.2.1 of this paper) overcome the difficulties associated with the payer making enquiries into whether there was an obligation to withhold? Please explain why this is, or is not, the case.
16. Where there is an Australian custodian, should they have an obligation to withhold from the proceeds they receive in relation to transactions with the 'taxable Australian property' of their foreign resident clients?

4.1.6 Other options

38. The proposed design outlined above has been provided for discussion purposes. Treasury welcomes views on other options for the design and implementation of the withholding tax measure.

Consultation Questions:

17. What are the other issues or options that should be considered in implementing this withholding tax measure? Where possible, please detail these issues or provide examples of how these other options may work.

4.2 FURTHER OPTIONS TO REDUCE THE RED-TAPE AND COMPLIANCE BURDEN

4.2.1 Payee declaration option

39. Given the potential penalties for not withholding, it can be expected that the payer would want to be certain that they had discharged their obligation to make reasonable enquiries and withhold when necessary. In some circumstances the information relevant to identifying whether there is an obligation to withhold would only be within the knowledge of the payee.
40. This raises a question regarding the extent to which the payer may rely on information provided by the payee when determining whether there is a potential withholding obligation.
41. One option to address this issue could be to adopt a similar approach to the system that operates in the United States.¹⁷ Under this approach the payer would be relieved of the obligation to withhold where they are provided with a declaration from the payee that:
 - the payee is a resident of Australia for income tax purposes, or
 - the asset subject to the transaction is not 'taxable Australian property'.

¹⁷ See section 1445 of the *Internal Revenue Code of 1986* and the associated Federal Regulations.

42. The practical effect of this option is that the payer is considered to have discharged their obligation to make reasonable enquiries if they act in accordance with the information provided in the payee's declaration. However, the payer would not be allowed to rely on the payee's declaration if they had knowledge that the information contained in the declaration was false.
43. The provision of a declaration would not be expected to create any additional compliance burden for payees. This is because the payee is already required to consider the information that would be contained in their declaration to the payer in order to determine whether they are likely to have any Australian income tax obligations. It does, however, bring forward to the time of the transaction the payee's attention to discover the extent of any Australian income tax obligation.

Consultation Questions:

18. Are there any issues that would make it difficult for the payee to provide the declaration referred to in paragraph 41?
19. If a payee declaration safe harbour was provided, how should this declaration be provided to the payer? For example, would more integrity be provided by requiring the declaration to be made under oath or could the declaration be included as a term in the contract exchanged between the parties?
20. Are there any other issues that would need to be considered in providing the payer with a safe harbour in the form of the payee declaration?

4.2.2 Disposals of assets on a public securities exchange

44. Some membership interests held by a foreign resident may be 'taxable Australian property' because they constitute an 'indirect Australian real property interest'. This category of assets could include shares or other securities that are listed on a public securities exchange.
45. Where a transaction involves an asset listed on a public securities exchange, it may be difficult for the payer to make enquiries into the tax residency status of the payee and whether the asset is 'taxable Australian property'. For example, where the disposal of a membership interest is undertaken 'on market' via a trading platform the transaction would ordinarily be executed via brokers and there would be no exchange of contracts or other interaction between the payee and payer. This means that the payer may not be able to make enquiries into the residency status of the payee, or whether the membership interest constitutes 'taxable Australian property'. Additionally, the payee may have limited capacity to provide the payer with a declaration regarding these matters. Given these limitations, it may be appropriate to consider how this measure would apply in these circumstances.
46. Listed securities may also be disposed of via an 'off market' transaction (that is a transaction undertaken without the involvement of stock brokers). In these circumstances the payee and payer may transact directly, or via intermediaries, so the payer may be better placed to make enquiries of the payee to establish whether there is an obligation to withhold.

Consultation Questions:

21. Are there any difficulties in relation to imposing a withholding tax on 'on market' transactions involving listed securities? If so, what are they and how might they be addressed?
22. Do the same issues or different issues arise in relation to an 'off market' transaction?

4.2.3 Clearance certificate from the Commissioner

47. Another option to relieve the payer from the obligation to withhold would be to allow a foreign resident to apply for a clearance certificate from the Commissioner. This is similar to the approach adopted by Canada.¹⁸ The purpose of the clearance certificate is to inform the payer that either no withholding is required, or that a reduced rate of withholding is required (the variation of the withholding rate is discussed under heading 4.2.4).
48. Under this option, when applying for a clearance certificate, the foreign resident would need to provide the Commissioner with relevant information. This may include:
 - Identifying whether the asset is 'taxable Australian property';
 - Details of the proposed payer (including name and address);
 - An estimate of the proceeds to be received under the transaction; and
 - An estimate of the cost base of the 'taxable Australian property'.
49. Information such as the estimates of the proceeds and cost base would enable the Commissioner to assess the quantum of the potential tax liability of the foreign resident payee in relation to the transaction. This could possibly lead to an adjustment of the amount to be withheld.
50. Under this option, where a potential tax liability exists, the foreign resident may also enter into an arrangement to either:
 - Pay an amount to cover any tax liability that will result from the transaction; or
 - Provide security to the Commissioner to hold against the ultimate tax liability.
51. A payer that receives a clearance certificate would be entitled to act in accordance with the information in that certificate and would not be required to make further enquiries.
52. This approach provides the payee with an opportunity to engage with the Commissioner to eliminate or reduce the requirement for proceeds to be withheld in relation to the transaction and also reduces the administrative burden on the payer.

¹⁸ See section 116 of the *Income Tax Act* (Canada).

Consultation Questions:

23. Are there practical benefits in implementing a clearance certificate process? If so, what are they?
24. Assuming all relevant information has been provided to the Commissioner, what timeframe would be required for the Commissioner to issue a clearance certificate?
25. Does this approach provide an incentive for the payee to engage with the Commissioner to relieve or reduce the withholding obligation? If not, why not?

4.2.4 Variation of withholding amount

53. In other withholding contexts, the Commissioner has the discretion to vary the amount to be withheld by a payer.¹⁹ This discretion includes the ability to reduce the amount to be withheld to nil. In these circumstances, any decision to vary the amount must be made by written notice.²⁰ The existing variation process currently requires a foreign resident payee to have an Australian tax file number and to lodge the variation application in the required forms.²¹ Where the Commissioner has agreed to the variation request, the payee is able to provide that information to the payer in order to reduce the amount withheld.
54. Under the current measure, the withholding tax is non-final and is withheld against the Australian income tax liability of the foreign resident payee for the relevant income period. During that period the foreign resident may only have an income tax liability as a result of the gain (if any) realised on the transaction involving their 'taxable Australian property'. It can be expected that in most cases the amount withheld (which is 10 per cent of the proceeds) will be different from the ultimate tax liability of the foreign resident. In addition, it may be the case that the payee makes a loss on the transaction with the result that they have no Australian income tax liability (at least in relation to that transaction).
55. In order to address these issues, it may be appropriate to give the Commissioner the discretion to vary the amount required to be withheld under the current measure. Under this option, and similar to the situation with other Australian withholding regimes, a foreign resident could request that the Commissioner exercise the discretion to vary the amount that is required to be withheld in relation to a transaction. This would require that the foreign resident provides the Commissioner with sufficient information to establish the quantum of the Australian income tax liability, if any, that will arise in relation to the transaction.

Consultation Questions:

26. If the Commissioner has the discretion to vary the withholding amount, what steps could be put in place for the payee to request the Commissioner to exercise this power?

¹⁹ For example, Section 15-15 of Schedule 1 to the TAA 1953.

²⁰ See subsection 15-15(3) of Schedule 1 to the TAA 1953.

²¹ PS LA 2006/10 titled 'The Commissioner's discretion to vary foreign resident withholding amounts' provides guidance on the use of the Commissioner's discretion under section 15-15 of Schedule 1 to the TAA 1953 to vary amounts required to be withheld from a withholding payment.

4.2.5 Transactions involving highly geared assets

56. In some circumstances the consideration paid to the payee, less the 10 per cent withholding amount, may be insufficient to discharge a mortgage or other loan secured over an asset that is involved in a transaction. In these circumstances it may not be possible to conclude a sale if a payee is unable to discharge the mortgage over real property prior to the settlement of the contract.
57. In order to ensure that the withholding tax does not prevent these transactions from occurring, it may be appropriate to consider whether the Commissioner should be able to exercise the discretion to vary the withholding amount in these circumstances (see discussion under heading 4.2.4 'Variation of withholding amount'). Addressing this issue may require an administrative arrangement between the payee and the Commissioner where the payee provides surety or guarantees to the Commissioner regarding the payment of any income tax liability that arises in respect of the transaction.

Consultation Questions:

27. There may be circumstances where the transaction proceeds (less the withheld amount) are insufficient to discharge a mortgage or other loan secured over the asset. How should the withholding tax measure deal with these circumstances? For example, could a surety or guarantee be provided in lieu of the withholding?
28. Are there other circumstances where the requirement to withhold 10 per cent from the sales proceeds may disrupt transactions? Please provide examples of these.

5. APPENDIX 1 — WHEN AN ASSET IS TAXABLE AUSTRALIAN PROPERTY

Section 855-15 of the *Income Tax Assessment Act 1997* provides that there are 5 categories of *CGT assets that are taxable Australian property. They are set out in this table.

CGT assets that are taxable Australian property		
Item	Description	
1	*Taxable Australian real property (see section 855-20)	
2	A *CGT asset that:	
	(a)	is an *indirect Australian real property interest (see section 855-25); and
	(b)	is not covered by item 5 of this table
3	A *CGT asset that:	
	(a)	you have used at any time in carrying on a *business through a permanent establishment (within the meaning of section 23AH of the <i>Income Tax Assessment Act 1936</i>) in Australia; and
	(b)	is not covered by item 1, 2 or 5 of this table
4	An option or right to *acquire a *CGT asset covered by item 1, 2 or 3 of this table	
5	A *CGT asset that is covered by subsection 104-165(3) (choosing to disregard a gain or loss on ceasing to be an Australian resident)	

Note:

An asset is also taxable Australian property if it was acquired by a company after 28 January 1988 and before 26 May 1988 from a foreign resident as a result of a disposal for which there was a roll-over under section 160ZZN or 160ZZO of the *Income Tax Assessment Act 1936*: see section 136-25 of the *Income Tax (Transitional Provisions) Act 1997*.

6. APPENDIX 2 — CONSOLIDATED CONSULTATION QUESTIONS

1. Are any circumstances likely to arise that would prevent a payer from making enquiries about whether the payee is a foreign resident for income tax purposes or from identifying reasonable grounds to believe that the payee is a foreign resident for income tax purposes? If so, what are they and how could these issues be addressed?
2. Are any circumstances likely to arise that would prevent a payer from making enquiries in relation to whether the transaction involves an asset that is 'taxable Australian property' or from identifying reasonable grounds to believe that the asset is 'taxable Australian property'? If so, what are they and how could these issues be addressed?
3. In relation to a membership interest that is an 'indirect Australian real property interest' is it reasonable to expect that a payer will be able to identify through due diligence whether the interest passes (i) the 'non-portfolio interest test' or (ii) the 'principal asset test'? If not, why not?
4. Could the ATO provide assistance in determining whether the payee is a foreign resident? If so, what would that be?
5. *Prima facie* the obligation to withhold is on the payer. Are there circumstances where it is more appropriate to place the obligation on another party? If so, what are these circumstances, and who should have the obligation?
6. Are there other circumstances when imposing a withholding obligation would present difficulties? If so, please explain these circumstances.
7. Assuming the measure applies to CGT events that occur on or after 1 July 2016, what issues, if any, need to be considered in relation to transactions commenced prior to that start date but not completed until after that time?
8. Where the consideration is payable in instalments, one approach would be to first withhold amounts from instalments until the total withholding obligation has been satisfied (for example, if the first instalment was less than 10% of the total proceeds, the payer would withhold the entire instalment). Are there any difficulties that would arise with this approach? If so, what are they? Is there an alternative approach? If so, what does that approach involve?
9. How should the withholding obligation apply to payments made post completion (for example, adjustments to the purchase price under a performance arrangement)?
10. The amount is normally withheld at the time that the payment is made or credited (for example, at settlement). This raises a question in relation to the time for remitting the withheld amount to the Commissioner: is settlement the appropriate time, or is some other time appropriate?

11. What impediments are there, if any, that would prevent the payer from being able to provide the Commissioner with the information referred to in paragraph 31? Is the information which may be required to be provided reasonable?
12. To ensure that withholding amounts are credited against the correct account, should there be a requirement for foreign residents to apply for a tax file number when they acquire 'taxable Australian property'?
13. What are the issues, if any, that would arise from adopting a definition similar to the term 'Residential property' as defined in the dictionary in Schedule 1 to the *First Home Owner Grant Act 2000* (QLD)? Are there other definitions that would be more appropriate?
14. In circumstances where an asset is held via an Australian custodian, how could a payer identify that the Australian custodian's client (that is the beneficial owner of the asset) is a foreign resident?
15. Would a declaration by either the custodian or the client (similar to the payee declaration 'safe harbour' discussed below under heading 4.2.1 of this paper) overcome the difficulties associated with the payer making enquiries into whether there was an obligation to withhold? Please explain why this is, or is not, the case.
16. Where there is an Australian custodian, should they have an obligation to withhold from the proceeds they receive in relation to transactions with the 'taxable Australian property' of their foreign resident clients?
17. What are the other issues or options that should be considered in implementing this withholding tax measure? Where possible, please detail these issues or provide examples of how these other options may work.
18. Are there any issues that would make it difficult for the payee to provide the declaration referred to in paragraph 41?
19. If a payee declaration safe harbour was provided, how should this declaration be provided to the payer? For example, would more integrity be provided by requiring the declaration to be made under oath or could the declaration be included as a term in the contract exchanged between the parties?
20. Are there any other issues that would need to be considered in providing the payer with a safe harbour in the form of the payee declaration?
21. Are there any difficulties in relation to imposing a withholding tax on 'on market' transactions involving listed securities? If so, what are they and how might they be addressed?
22. Do the same issues or different issues arise in relation to an 'off market' transaction?
23. Are there practical benefits in implementing a clearance certificate process? If so, what are they?
24. Assuming all relevant information has been provided to the Commissioner, what timeframe would be required for the Commissioner to issue a clearance certificate?

25. Does this approach provide an incentive for the payee to engage with the Commissioner to relieve or reduce the withholding obligation? If not, why not?
26. If the Commissioner has the discretion to vary the withholding amount, what steps could be put in place for the payee to request the Commissioner to exercise this power?
27. There may be circumstances where the transaction proceeds (less the withheld amount) are insufficient to discharge a mortgage or other loan secured over the asset. How should the withholding tax measure deal with these circumstances? For example, could a surety or guarantee be provided in lieu of the withholding?
28. Are there other circumstances where the requirement to withhold 10 per cent from the sales proceeds may disrupt transactions? Please provide examples of these.