



Explanatory Statement

Taxation Administration (PAYG Withholding Variation for Foreign Resident Capital Gains Withholding Payments) Legislative Instrument 2026

General outline of instrument

1. This instrument is made under subsection 14-235(5) in Schedule 1 to the *Taxation Administration Act 1953* (the Act).
2. This instrument varies the amount that an entity that acquires certain CGT assets from a relevant foreign resident must pay to the Commissioner under the foreign resident capital gains withholding (FRCGW) regime. The variations ensure that FRCGW appropriately reflects expected income tax liabilities relating to the change in ownership of the CGT asset and resolve practical difficulties that may arise in certain situations.
3. This instrument consolidates 5 existing class variation legislative instruments into a single instrument, making it easier to identify whether a FRCGW class variation applies.
4. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
5. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Date of effect

6. The instrument (except subsection 6(4)) commences on the day after it is registered on the Federal Register of Legislation.
7. Subsection 6(4) commences on the later of:
 - (a) the day after the instrument is registered on the Federal Register of Legislation, and
 - (b) the day that Schedule 2 to the *Treasury Laws Amendment (Strengthening Accountability for Tax Adviser Misconduct and Other Measures) Act 2026* commences.
8. However, subsection 6(4) will not commence at all if Schedule 2 to the *Treasury Laws Amendment (Strengthening Accountability for Tax Adviser Misconduct and Other Measures) Act 2026* does not commence.

Background

9. The FRCGW regime was designed to assist in the collection of tax from foreign residents by imposing withholding obligations on the owner of certain Australian CGT assets that they acquire from an entity that is a relevant foreign resident.

10. Under subsection 14-210(1) in Schedule 1 to the Act, a relevant foreign resident includes:
- (a) a foreign resident (that is, not an Australian resident) who disposes of taxable Australian real property, an indirect Australian real property interest (IARPI), or an option or right to acquire those kinds of property or interests; or
 - (b) an entity (that may be an Australian resident) that disposes of a CGT asset that is either taxable Australian real property, or is an IARPI, the holding of which causes a company title interest (within the meaning of Part X of the *Income Tax Assessment Act 1936*) to arise.
11. However, under subsection 14-210(2) of Schedule 1 to the Act an entity is not a relevant foreign resident if they provide a clearance certificate and the asset to which the transaction relates is taxable Australian real property or an IARPI, the holding of which causes a company title interest to arise.
12. A *clearance certificate* is a certificate that is issued by the Commissioner under section 14-220 in Schedule 1 to the Act and which certifies that, based on information known to the Commissioner, there is nothing to suggest that the entity disposing of the asset is a foreign resident during a specified period.
13. An entity is also not a relevant foreign resident if they make a residency declaration or non-IARPI declaration (together known as ‘vendor declarations’).
14. In circumstances where the CGT asset being disposed of is not taxable Australian real property or an IARPI, the holding of which causes a company title interest to arise, an entity may make a *residency declaration* under subsection 14-225(1) in Schedule 1 to the Act. A residency declaration declares that, for a specified period, the entity is and will be an Australian resident.
15. A *non-IARPI declaration* is a declaration made by the entity under subsection 14-225(2) in Schedule 1 to the Act that, for a specified period, certain assets are membership interests but not IARPI. IARPI are interests, such as shares or units, in an entity whose value is principally attributable to Australian real property and at least 10% of the membership interest in the underlying entity.
16. Schedule 2 to the Treasury Laws Amendment (Strengthening Accountability for Tax Adviser Misconduct and Other Measures) Bill 2026, on commencement, will amend the non-IARPI declaration legislative framework such that a non-IARPI declaration can only be relied upon by the entity acquiring a CGT asset if one of the following conditions in paragraph 14-210(3)(d) in Schedule 1 to the Act applies:
- (a) the aggregated transaction value is under \$50 million; or
 - (b) the Commissioner and the acquirer of the CGT asset have been appropriately notified under new framework; or
 - (c) the transaction is covered by a determination made by the Minister under paragraph 14-210(6)(b) in Schedule 1 to the Act.
17. To have effect, a clearance certificate or vendor declaration must be issued, made or granted before the relevant CGT asset is acquired, and must apply, or cover the period, at the time the acquisition occurs.
18. Section 14-200 in Schedule 1 to the Act requires the owner of these CGT assets that are acquired from a relevant foreign resident, to withhold and pay an amount to the Commissioner in relation to that transaction on or before the day they become the CGT asset’s owner.
19. Under section 14-200 in Schedule 1 to the Act, the owner of the asset must pay to the Commissioner an amount that is either:
- (a) 15% of money paid or market value of the property given for the CGT asset less, if the acquisition is as a result of exercising an option, any payment made for, and the market value of any property an entity gave for, the option; or

- (b) the amount that has been varied by the Commissioner under section 14-235 in Schedule 1 to the Act.

20. Section 14-205 in Schedule 1 to the Act requires the owner to pay an amount to the Commissioner where it provides a financial benefit to a relevant foreign resident under a look-through earnout right relating to the acquisition of the CGT asset, and no amount has otherwise been withheld under the FRCGW regime. The provision extends the operation of the regime beyond the initial acquisition of the asset to ensure that amounts paid to foreign residents under certain deferred or contingent consideration arrangements are also subject to withholding, supporting the collection of capital gains tax payable by foreign residents.

21. The Commissioner may also vary the amount of FRCGW that the owner of the CGT asset is liable to pay.

22. A *notice of variation* is a notice granted by the Commissioner under subsection 14-235(2) in Schedule 1 to the Act, that varies the amount of FRCGW the owner is required to withhold. The amount to be paid, where the entity has a notice of variation, will be varied to the amount specified in the notice.

23. When varying an amount under section 14-235 in Schedule 1 to the Act, the Commissioner must have regard to the need to protect a creditor's right to recover a debt.

24. Under subsection 14-235(5) in Schedule 1 to the Act, the Commissioner may vary classes of amounts payable under Subdivision 14-D in Schedule 1 to the Act by legislative instrument. The Commissioner exercised this power by the following legislative instruments:

- (a) *PAYG Withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple entities;*
- (b) *PAYG Withholding variation for foreign resident capital gains withholding payments – deceased estates and legal personal representatives;*
- (c) *PAYG Withholding variation for foreign resident capital gains withholding payments – income tax exempt entities;*
- (d) *PAYG Withholding variation for foreign resident capital gains withholding payments – marriage or relationship breakdowns;*
- (e) *PAYG Withholding variation for foreign resident capital gains withholding payments – no residue after a mortgagee exercises a power of sale 2020.*

25. This instrument repeals, consolidates and replaces these instruments. This instrument has, with the exception of the variation relating to acquisitions from income tax exempt entities, the same effect as the instruments that it is replacing. With regard to the variation relating to acquisitions from income tax exempt entities, the evidentiary requirements that must be satisfied for the variation to apply have been amended in this instrument.

Effect of this instrument

Section 6 – Variation for acquisitions from multiple vendors

26. Section 6 varies the amount that the owner of a relevant CGT asset (an asset to which the FRCGW regime applies) must pay to the Commissioner under sections 14-200 and 14-205 in Schedule 1 to the Act where:

- (a) the owner has acquired the asset from more than one entity;
- (b) at least one of these entities is a relevant foreign resident; and
- (c) at least one, but not all, of the entities have provided the owner of the CGT asset with a clearance certificate, non-IARPI declaration, residency declaration or a notice of variation that is in force at, or that covers the period of, the time of the acquisition.

27. Where the circumstances in subsection 6(1) are met, the amount the owner must pay to the Commissioner is the sum of the following amounts (in relation to each entity from which the asset is acquired):

- (a) for each entity that has not provided the owner of the CGT asset with one of the documents in paragraph 6(1)(c), the amount which would otherwise be required to be paid to the Commissioner under section 14-200 or 14-205 in Schedule 1 to the Act multiplied by the entity's percentage interest in the CGT asset just before the acquisition; and
- (b) for each entity that has provided a notice of variation that is in force at the time of the acquisition, the varied amount in the notice; and
- (c) for each entity covered by subsection 6(4), the amount which would otherwise be required to be paid to the Commissioner under section 14-200 or 14-205 in Schedule 1 to the Act multiplied by the entity's percentage interest in the CGT asset just before the acquisition; and
- (d) for all other entities, nil.

28. An entity's percentage interest in the CGT asset must be known for the purpose of working out the amount to be paid in relation to an entity under paragraph 6(2)(a). Where a CGT asset is held by multiple entities as tenants in common, the percentage interest of each entity can be easily ascertained.

29. However, where an asset is held by multiple entities as joint tenants, each entity's percentage interest may not be easy to determine. In relation to these assets, subsection 6(3) applies so that each entity is treated as holding an equal percentage interest in the asset. This approach aligns with how CGT assets held by joint tenants are treated under section 108-7 of the *Income Tax Assessment Act 1997* (ITAA 1997).

30. An entity is covered by subsection 6(4) where:

- (a) the entity has provided a non-IARPI declaration; and
- (b) has not provided a clearance certificate, residency declaration or notice of variation that is in force at, or that covers the period of, the time of the acquisition; and
- (c) none of the conditions in paragraph 14-210(3)(d) in Schedule 1 to the Act applies to the non-IARPI declaration.

31. Schedule 2 to the Treasury Laws Amendment (Strengthening Accountability for Tax Adviser Misconduct and Other Measures) Bill 2026, on commencement, will introduce a new requirement (via paragraph 14-210(3)(d) in Schedule 1 to the Act) for an entity to notify the Commissioner of a non-IARPI declaration related to transactions of \$50 million or more in order for the non-IARPI declaration to be valid. This new requirement applies unless those kinds of transactions are exempted by the Minister under paragraph 14-210(6)(b) in Schedule 1 to the Act.

32. Subsection 6(4), through the conditions in paragraph 14-210(3)(d) in Schedule 1 to the Act, incorporates this requirement into the variation to ensure that in situations where the primary law requires an entity to notify the Commissioner of a non-IARPI declaration and they fail to do so they will not benefit from the withholding variation provided by this instrument.

33. Without this variation the owner of the CGT asset would generally be required to pay the Commissioner an amount equal to 15% of the market value of the CGT asset (usually the purchase price), including where some of the entities are Australian residents who would not otherwise be captured under the FRCGW regime. Whereas the amount payable under subsection 6(2) takes into account the ownership proportion of the CGT asset that is attributable to relevant foreign residents only.

Example

The new owner of a commercial property must work out the amount of FRCGW they are required to pay to the Commissioner in relation to this acquisition. The property was purchased for \$3.3 million from 2 entities – Seller A and Seller B.

As Seller A provides the new owner with a valid clearance certificate at the time of the acquisition, they are not a relevant foreign resident under subsection 14-210 in Schedule 1 to the Act. However, Seller B does not provide a clearance certificate (so they are a relevant foreign resident) and doesn't provide any other documentation specified in paragraph 6(1)(c).

The amount to be paid to the Commissioner by the new owner, worked out under subsection 6(2), is the sum of the following amounts:

- (a) for Seller A, who has provided a valid clearance certificate, the amount is nil; and*
- (b) for Seller B the new owner works out the amount that would otherwise be payable to the Commissioner under paragraph 14-200(3)(a) in Schedule 1 to the Act in relation to the acquisition, and then multiplies this amount by Seller B's percentage interest in the asset.*

The new owner calculates that the amount that would otherwise be payable to the Commissioner in relation to the acquisition of the property is \$495,000. By multiplying this amount by Seller B's percentage interest in the asset (which the new owner knows is 60%), they determine the amount they must pay to the Commissioner in relation to Seller B is \$297,000.

Therefore, the new owner must pay \$297,000 to the Commissioner (being the sum of the amounts for each entity from which the asset is acquired).

Section 7 – Variation for acquisitions resulting from death

34. Generally, under Division 128 of the ITAA 1997, when an individual dies any capital gain or capital loss on a CGT asset they owned just before death is disregarded (meaning there is no income tax consequence arising from the individual's death), and capital gains tax (CGT) is deferred until a later disposal by the executor or beneficiary.

35. For CGT purposes, the acquisition of a CGT asset as the result of the death of an individual is taken to occur under sections 128-15 (in relation to legal personal representatives or beneficiaries), 128-25 (in respect of beneficiaries that are complying superannuation entities), and 128-50 (in respect of surviving joint tenants) of the ITAA 1997.

36. Section 128-10 of the ITAA 1997 provides that any capital gain or loss in relation to a CGT asset an individual owned just before dying is disregarded. Similarly, subsection 128-15(3) of the ITAA 1997 provides that any capital gain or loss a legal personal representative makes on the passing of an asset to a beneficiary of the deceased estate is disregarded.

37. Despite CGT being disregarded under Division 128 of the ITAA 1997 in these circumstances, where the deceased individual is a relevant foreign resident section 14-200 in Schedule 1 to the Act will apply to the acquisition of the CGT asset.

38. Although the requirement to pay an amount under the FRCGW regime may be displaced where a clearance certificate, residency or non-IARPI declaration, or notice of variation is held in relation to the acquisition of the relevant CGT asset, it may be difficult for a legal personal representative, beneficiary or surviving joint tenant to obtain one of the documents before the CGT asset is acquired and the FRCGW requirements arise.

39. These documents must be issued, made or granted before the CGT asset is acquired while, under sections 128-15, 128-25 and 128-50 of the ITAA 1997, the CGT asset is taken to have been acquired on the day the deceased died. As such, there may not be time before the CGT asset is

acquired for a clearance certificate to be issued, a declaration to be made, or a notice of variation to be granted.

40. Section 7 varies to nil the amount that must be paid to the Commissioner under section 14-200 in Schedule 1 to the Act, where the asset devolves to a legal personal representative or passes to a beneficiary of the estate, passes to a beneficiary who is a trustee of a complying superannuation entity, or where the asset, which was held as joint tenants, passes to the surviving joint tenants.

41. This variation aligns the FRCGW and income tax treatment of CGT assets acquired from a deceased individual and provides certainty to legal personal representatives, beneficiaries and joint tenants that no amount of FRCGW is payable to the Commissioner in relation to these acquisitions.

Section 8 – Variation for acquisitions from income tax exempt entities

42. Although an income tax exempt entity is not generally required to pay income tax on exempt income, a CGT event will still occur when the entity disposes of a CGT asset, and for the purchaser there is an acquisition. This means that while an income tax exempt entity may not be liable for income tax relating to the disposal of its ownership of a relevant CGT asset, the FRCGW regime may still apply to the transaction because of the purchaser making an acquisition of an asset.

43. Where the CGT asset is taxable Australian real property, or an IARPI giving rise to a company title interest, and the income tax exempt entity is an Australian tax resident, the exempt entity would need to apply for a clearance certificate to ensure the acquirer of the asset does not have to pay an amount to the Commissioner under the FRCGW regime.

44. Where the CGT asset is another kind of asset the income tax exempt entity would need to complete a vendor declaration to authorise the acquirer of the asset to not pay the Commissioner an amount under the FRCGW regime.

45. In circumstances where a clearance certificate has not been (or cannot be) obtained, or a vendor declaration has not been (or cannot be) provided, the income tax exempt entity would need to apply for a notice of variation issued by the Commissioner under subsection 14-235(2) in Schedule 1 to the Act.

46. Section 8 varies to nil the amount payable under section 14-200 in Schedule 1 to the Act where a relevant CGT asset is acquired from a specified exempt entity.

47. Specified exempt entities are entities that are either registered on the Australian Business Register as a Commonwealth, State, Territory or Local Government entity or are a registered charity with documentation showing they are endorsed under Subdivision 50-B of the ITAA 1997 as being exempt from income tax.

48. The variation in section 8 is substantially the same as in the *PAYG Withholding variation for foreign resident capital gains withholding payments – income tax exempt entities* (exempt entities instrument). However, in the exempt entities instrument, the income tax exempt entity is required to provide the purchaser of the asset with a private ruling confirming its exempt status, while section 8 now uses the entity's registration on the Australian Business Register as evidence of its status as an income tax exempt entity. This requirement has been changed because, in practice, obtaining a private ruling proved more burdensome for these entities than obtaining a clearance certificate, variation, making a vendor declaration, or having the amount withheld and then refunded.

49. This variation aligns the FRCGW and income tax treatment of these transactions and removes the need for the specified exempt entity to apply to the Commissioner for a clearance certificate, notice of variation, or to make a declaration. As these entities have no income tax liability there is no need for the acquirer of the CGT asset to withhold amounts on behalf of them.

Section 9 – Variation for acquisitions resulting from marriage or relationship breakdowns

50. The transfer of a relevant CGT asset between spouses, or former spouses, because of a matter referred to in subsection 126-5(1) of the ITAA 1997, would be a rollover event in which the CGT payable in relation to the transfer of ownership may be deferred or disregarded.

51. The matters in subsection 126-5(1) of the ITAA 1997 include court orders under a Commonwealth, State or Territory, or foreign law relating to the breakdown of relationships between spouses, a maintenance agreement approved by a court under section 87 of the *Family Law Act 1975* (or a corresponding agreement approved by a court under a corresponding foreign law), something done under certain financial or written agreements or under certain awards.

52. Where the relevant CGT asset is taxable Australian real property or a non-IARPI, although CGT may be deferred or disregarded under the ITAA 1997 the person who acquires the asset may still be required to pay an amount to the Commissioner under section 14-200 in Schedule 1 to the Act in relation to that acquisition unless they are provided with a valid clearance certificate or vendor declaration at the time they acquire ownership of the asset.

53. For a clearance certificate or vendor declaration to have effect, it must be in force and be provided to the person by the time they acquire ownership of the CGT asset from their spouse or former spouse. However, depending on the terms of the court orders, agreement or award, transfer of ownership of the asset could occur when the order, agreement or award is made which may not provide sufficient notice or time for the spouse, or former spouse, to obtain a clearance certificate or vendor declaration.

54. Section 9 varies to nil the amount the owner of the asset would be required to pay under section 14-200 in Schedule 1 to the Act where they acquire the asset from their spouse or former spouse because of the matters referred to in subsection 126-5(1) of the ITAA 1997. The owner must hold a copy of relevant documents relating to those matters such as a court order, maintenance agreement or award by the time the transfer of the asset is finalised.

55. This variation aligns the FRCGW and income tax treatment of these transactions and ensures that the owner of the CGT asset is not required to pay an amount of FRCGW to the Commissioner in circumstances where the transfer of ownership of the asset would otherwise be a rollover event.

Section 10 – Variation for acquisitions resulting from mortgagee sales

56. In all Australian states and territories, mortgagees are given a power of sale where mortgage money has become due and payable, and other conditions are satisfied.

57. Generally, the power of sale authorises the mortgagee to do all things necessary to sell the mortgaged property by public auction or private contract. Incidental powers available to mortgagees include the power to sell part of the property, or things attached to the property such as mines and minerals.

58. As a result of exercising a power of sale, the mortgagee assumes various duties and obligations with respect to the sale proceeds. Although the particular provisions differ in each state and territory, the requirements concerning the application of the sale proceeds are broadly consistent. That is, the mortgagee is required to apply the sale proceeds in the following order:

- (a) payment of all incidental costs, charges and expenses that were incurred in selling the property;
- (b) discharge of any mortgage money, interest, costs and other amounts due under the mortgage; and
- (c) payment of any residue from the sale proceeds to the mortgagor.

59. In New South Wales and the Northern Territory, the provisions specifically provide that subsequent mortgages are to be paid prior to the residue being distributed to the mortgagor.

60. A mortgagee exercising a power of sale must calculate all costs, mortgages, and subsequent mortgages associated with the mortgaged property and account for such payments from the sale proceeds. The residue is calculated by subtracting these amounts from the proceeds of the sale. After these amounts are deducted from the sale proceeds, there may be no residue (that is, no money remaining) to be paid to the mortgagor.

61. The new owner of the relevant CGT asset may be required to pay an amount of FRCGW to the Commissioner in relation to the acquisition unless the mortgagor obtains a clearance certificate, makes a residency declaration or requests a notice of variation. Where the mortgagor does not (or cannot) obtain one of these documents before the sale, the new owner of the property will be required to pay an amount to the Commissioner under section 14-200 in Schedule 1 to the Act.

62. Where a mortgagee applies to the Commissioner to grant a variation under section 14-235(2) in Schedule 1 to the Act, the Commissioner will generally allow a variation to nil where the sale proceeds are insufficient to discharge the mortgage and also satisfy the FRCGW obligation. This is because subsection 14-235(1) in Schedule 1 to the Act requires the Commissioner to have regard to the need to protect a creditor's right to recover a debt.

63. Section 10 varies the amount payable under section 14-200 in Schedule 1 to the Act to nil in relation to the acquisition of real property of a kind mentioned in paragraph 855-20(a) of the ITAA 1997 where:

- (a) the acquisition occurs as a result of a specified mortgagee exercising its power of sale over the CGT asset;
- (b) the residue from the sale of the CGT asset is zero or less than zero; and
- (c) the specified mortgagee has provided the owner with written notification that they are not required to pay an amount to the Commissioner under section 14-200 in Schedule 1 to the Act, because the preceding conditions in section 10 have been met.

64. Under this variation, the mortgagee is not required to submit a variation request to the Commissioner in circumstances where the Commissioner would generally grant a variation (if requested).

65. A specified mortgagee means the entity, which is an authorised deposit-taking institution (within the meaning of section 5 of the *Banking Act 1959*), to which the CGT asset is mortgaged.

66. Where a residue is payable to the mortgagor, but this amount is insufficient to satisfy the FRCGW obligation, this variation will not apply. The mortgagee would be required to submit a variation request to the Commissioner so that the circumstances can be properly considered.

67. A variation request must also be submitted to the Commissioner in the event that the power of sale is subject to potential challenges or disputes (such as equitable claims), or there is any other uncertainty regarding the application of sale proceeds.

Compliance cost assessment

68. Compliance cost impact: Minor – There will be no additional regulatory impacts as the instrument is minor and machinery in nature.

Consultation

69. Subsection 17(1) of the *Legislation Act 2003* requires that the Commissioner is satisfied that appropriate and reasonably practicable consultation has been undertaken before they make a determination.

70. For this instrument, broad public consultation was undertaken for a period of 4 weeks. No public comments were received during the consultation period.

71. However, paragraph 6(2)(c) and subsection 6(4) were added to the instrument after consultation to account for the new requirement in Schedule 2 to the Treasury Laws Amendment (Strengthening Accountability for Tax Adviser Misconduct and Other Measures) Bill 2026, which affects the withholding variation under section 6. This Bill is likely to be enacted at a time close to when the instrument will commence. As a result, there was no time to consult on these specific updates to the instrument.

72. The draft instrument and draft explanatory statement were published to the ATO Legal database. Publication was advertised via the 'What's new' page on that website, and via the 'Open Consultation' page on ato.gov.au. Major tax and superannuation publishers and associations monitor these pages and include the details in the daily and weekly alerts and newsletters to their subscribers and members. This ensures advice of the draft is disseminated widely across the tax professional community, and that they are in an informed position to provide comments and feedback.

Statement of compatibility with human rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Taxation Administration (PAYG Withholding Variation for Foreign Resident Capital Gains Withholding Payments) Legislative Instrument 2026

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

This instrument varies the amount that an entity that acquires certain CGT assets from a relevant foreign resident must pay to the Commissioner under the foreign resident capital gains withholding (FRCGW) regime in certain circumstances. The variations ensure that FRCGW is appropriately applied to CGT assets at the time of the acquisition.

This instrument consolidates 5 existing class variation legislative instruments into a single instrument, making it easier to identify whether a FRCGW class variation applies.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms as it merely varies the amount of FRCGW that must be paid in relation to the acquisition of certain CGT assets from relevant foreign residents.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.