Explanatory Statement

PAYG Withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple entities

General Outline of Instrument

1. This instrument is made under subsection 14-235(5) of Schedule 1 to the *Taxation Administration Act 1953* (TAA).
2. Subdivision 14-D of the TAA requires that an amount be paid to the Commissioner of Taxation following the acquisition of certain assets from one or more entities where at least one of those entities is a foreign resident within the meaning of subsection 14-210(1), at the time of the transaction.
3. The instrument varies the amount which would otherwise be required to be paid to the Commissioner under section 14-200 and under section 14-205 of the TAA to ensure that it is calculated based upon the proportion of the acquisition cost and the market value of the financial benefit, which is attributable to foreign resident entities.
4. This 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 commences on 1 July 2016.

What is this instrument about

7. Subdivision 14-D of the TAA introduces a new regime, commencing on 1 July 2016 that imposes withholding obligations on the purchasers of certain Australian assets. The purpose of the regime is to assist in the collection of foreign residents' capital gains tax (CGT) liabilities.
8. This instrument ensures that the amount of withholding which is collected under that subdivision when the relevant asset is acquired from multiple entities, including both Australian and foreign residents, is reduced to reflect only the foreign resident entities' entitlement to the proceeds.
9. This instrument avoids unnecessary withholding from Australian resident entities.

What is the effect of this instrument

10. In the absence of a variation under section 14-235, as is provided under this instrument, subsection 14-200(3) would require an amount to be paid to the Commissioner equal to 10% of the entire acquisition cost for the relevant asset, and subsection 14-205(4) would require an amount to be paid to the Commissioner equal to 10% of the market value of the financial benefit.
11. The purpose of this instrument is to provide certainty to payers in calculating the amount to be paid to the Commissioner and to ensure that amounts are not payable in relation to vendor entities that are not foreign residents.
12. An assessment of the compliance cost impact indicates that the impact will be minor for both implementation and on-going compliance costs. The new instrument is of a minor or machinery nature.

Example

13. A property is to be sold for an amount of $4million. The selling owners are: A, an Australian resident who owns 50%; B, an Australian resident who owns 25% and C, a foreign resident who owns 25%. A and B have provided valid clearance certificates to the purchaser. The amount to be withheld from the purchase price is 10% of the amount attributable to C. That is 10% of $1miilion, being $100,000.

Background

14. The PAYG system, introduced in A New Tax System (Pay As You Go) Act 1999, is a simple and convenient way for taxpayers to meet their annual income tax liabilities either through instalments or through withholding as their income is earned. This system aims to prevent large end-of-year tax bills for relevant entities. It also ensures that Government has the revenue it needs during the year to provide services and benefits to the community.
15. Subdivision 14-D forms part of the Pay As You Go Withholding system and its purpose is to assist in the collection of capital gains tax from foreign entities.

Consultation:

16. The ATO has consulted extensively with legal bodies and persons engaged in the real estate and conveyancing industries about the implementation of subdivision 14-D. Consultation involved face to face meetings with detailed discussions of all elements of the proposed law. The purpose of this consultation was to ensure that the law achieved its purpose while unintended impacts and compliance costs for the community were minimised.
17. The consultation was followed more recently with information sessions for persons engaged in those three industries, following the passage of legislation.
18. This instrument deals with an anomaly within the law which was identified during the course of those information sessions. There was never any intention that withholding would be required from amounts payable to Australian resident vendors, yet the law would require that in the circumstances described above.

19. Copies of this instrument and explanatory statement were provided for comment to a total of 26 representatives of the legal profession and real estate and conveyancing industries on 31 May 2016. Those representatives accepted the need for the variation and provided no negative comment in relation to the draft.

Steve Vesperman
Deputy Commissioner of Taxation
29 June 2016

Legislative references:

Taxation Administration Act 1953

Legislation Act 2003

A New Tax System (Pay As You Go) Act 1999

Statement of Compatibility with Human Rights

This Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

PAYG Withholding variation for foreign resident capital gains withholding payments – acquisitions from multiple vendors

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

This Legislative Instrument avoids unnecessary withholding from amounts attributable to an Australian resident, following the disposal of certain Australian assets. It provides certainty to payers in calculating the amount to be paid to the Commissioner and to ensure that amounts are not payable in relation to vendor entities that are not foreign residents.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms because the new instrument is of a minor or machinery nature. The schedules set out the amounts, formulas and procedures to be used for calculating the amount required to be withheld by entities from withholding payments.

Conclusion

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