Australian Government
The Treasury

Strengthening the foreign resident capital gains tax regime

Consultation paper

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In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.

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Consultation Process

Request for feedback and comments

This paper provides context about the Government's Budget measure to strengthen Australia's foreign resident capital gains tax regime and invites interested parties to comment on the implementation details. While submissions may be lodged electronically or by post, electronic lodgement is preferred.

All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless it is indicated 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. Respondents who would like part of their submission to remain confidential should provide this information marked in a separate document.

A request made under the *Freedom of Information Act 1982* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Treasury will consult with stakeholders on the legislative materials, ahead of finalising legislation, in line with standard practice.

Closing date for submissions: **20 August 2024**

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This paper details the Government's 2024-25 Budget measure **Strengthening the foreign resident CGT regime**, announced to commence from 1 July 2025.

Strengthening the foreign resident CGT regime

Introduction

The Government announced in the 2024-25 Budget a measure to strengthen the foreign resident capital gains tax (**CGT**) regime to ensure foreign residents pay their fair share of tax in Australia and to provide greater certainty for foreign investors by better aligning our domestic legislation with international tax best practice.[1]

This measure will ensure that Australia can tax gains by foreign residents on direct and indirect sales of assets with a close economic connection to Australian land and/or natural resources. This brings the CGT outcome of foreign residents with respect to Australia's unique land and natural resources more in line with the tax treatment applicable to Australian residents.

The reforms consist of three complementary elements to increase the integrity and certainty of the foreign resident CGT rules contained in Division 855 of the *Income Tax Assessment Act 1997* (**ITAA 1997**). The measure will apply to CGT events commencing on or after 1 July 2025 to:

- clarify and broaden the types of assets that foreign residents are subject to CGT on;
- amend the point-in-time principal asset test (**PAT**) to a 365-day testing period;
- require foreign residents disposing of shares and other membership interests exceeding $20 million in value to notify the Australian Taxation Office (**ATO**), in the approved form prior to the transaction being executed.

This measure applies to determine a capital gain or loss on disposal – it does not change the existing operation of when a CGT event occurs, nor does it change the taxation settings on the regular income stream (yield) of an asset or project during the life of the investment.

For context, when an entity disposes of an asset that is subject to CGT, this is known as a CGT event, which can result in a capital gain or a capital loss. A capital gain arises when there is a profit from selling the asset – that is, the sale proceeds from disposal exceed the cost of acquiring, installing, holding and disposing of the asset. CGT is the tax paid on this type of profit which, where applicable, is included in taxable income as a net capital gain and taxed at the entity's relevant income tax rate.

In this regard, CGT is a longstanding feature of the tax system and is important for maintaining integrity and equity, by ensuring that those earning similar amounts through different means (e.g. salary and investment in assets) are taxed a similar amount (this is the principle of horizontal equity).

Australia's current foreign resident CGT regime was introduced in 2006 and taxes foreign residents on their gains arising from the disposal of Australian real property, including on indirect disposals.[2] However the scope of assets within Australia's current rules does not cover the full range of assets over which Australia has jurisdiction to tax under Australia's tax treaty policy and the OECD Model Tax Convention on Income and Capital (**OECD Model Tax Convention**).[3] This has, in turn, required legislative amendments to address integrity issues and uncertainty since 2006.[4]

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[1] Budget Paper No. 2, *Budget Measures 2024-25*, pp 17-18.
[2] Tax Laws Amendment (2006 Measures No. 4) Bill 2006, Schedule 4.
[3] OECD, *Model Tax Convention on Income and on Capital version 2017,* OECD Publishing, Paris, Article 6, p. 33.
[4] For example, amending the legislation to clarify that real property includes a leasehold interest in land (refer, Tax Laws Amendment (2009 Measures No. 4) Bill 2009, Schedule 5, Item 337-338).

The Budget measure will address the ongoing uncertainty by clarifying and broadening the types of assets which are included in the CGT base for foreign residents. This will ensure Australia can tax gains on assets that have a close economic connection to Australian land and/or natural resources, while balancing broader foreign investment considerations. This will bring foreign residents' CGT outcomes with respect to Australia's unique land and natural resources into closer alignment with the tax treatment for Australian residents, and with international tax best practice.

The Budget measure will also improve the integrity of the PAT in line with the OECD Model Tax Convention, and reinforce compliance by foreign residents with the CGT regime by introducing an ATO notification process for vendor declarations that a CGT asset is not an indirect Australian real property interest (**IARPI**).

Foreign residents will continue to benefit from an exemption from Australian CGT in respect of gains on direct and indirect sales of assets that do not have a close economic connection to Australian land and/or natural resources.

Treasury seeks input from stakeholders on the implementation details, as outlined below. The paper includes specific questions, to help guide stakeholder input.

These reforms complement the 2023-24 Mid-Year Economic and Fiscal Outlook (**MYEFO**) measure to increase the integrity of the foreign resident capital gains withholding (**FRCGW**) regime.[5] The FRCGW regime operates to assist with the collection of CGT liabilities owed by foreign residents and to encourage compliance with their Australian tax obligations. It does this by imposing a non-final withholding obligation on the purchase of certain Australian real property and related interests acquired from a foreign resident vendor.

The 2023-24 MYEFO FRCGW measure will increase the FRCGW rate to 15 per cent, from 12.5 per cent, and remove the $750,000 threshold before which withholding applies. These changes will apply from the later of 1 January 2025 and the commencement of the relevant legislation, and are subject to a separate exposure draft consultation process, available on the Treasury website.

Principles for taxation of foreign resident capital gains

Australia, like other countries, asserts source jurisdiction to tax income and gains of foreign residents in respect of economic activity that occurs in its territory. In general, Australian residents are taxed on worldwide income and gains (with some exceptions), and foreign residents are taxed only on Australian-sourced income and gains.

OECD Model Tax Convention

International tax practice, as reflected in the OECD Model Tax Convention, limits source jurisdiction taxation of capital gains made by foreign residents to gains made on immovable property (generally referred to as real property in Australia's domestic tax law) situated in the jurisdiction. This is expressed in Article 13 and Article 6 of the OECD Model Tax Convention. Article 13 preserves the source jurisdiction's right to tax gains on "immovable property" as defined in Article 6(2):

> The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of,

[5] Mid-Year Economic and Fiscal Outlook 2023-24, p. 195.

or the right to work, mineral deposits, sources, and other natural resources; ships and aircraft shall not be regarded as immovable property.

Article 13 of the OECD Model Tax Convention further stipulates that gains from the disposal of shares are taxable in the source jurisdiction if "at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property". This provision is also included in the Multilateral Instrument, which Australia has ratified. [6]

Australia's tax treaty practice

Australia's long-standing treaty practice is to retain source-based taxation rights over immobile assets, including real property and natural resources, consistent with the OECD Model Tax Convention. This recognises that these assets are unique to Australia and that they cannot be moved, replaced, or attained in any other jurisdiction; that is, it is economically efficient and Australia's sovereign right to tax these assets. Australia seeks to preserve its jurisdiction to tax gains from the disposal of such assets whether they are realised by an Australian resident or a foreign resident.

The current Australian regime

Division 855 of the ITAA 1997 contains Australia's regime for foreign resident CGT. This regime is broadly consistent with, but comparatively narrower than, international tax practice. Australia permits foreign residents to disregard a capital gain or loss from a CGT event, unless that CGT asset is "taxable Australian property" (**TAP**), which is defined as:[7]

- CGT assets that are "taxable Australian real property" (**TARP**);
- CGT assets that are an IARPI ("indirect Australian real property interests"), defined to be non-portfolio membership interests (of 10 per cent or more) where more than 50 per cent of the underlying entity's market value is derived from TARP (the PAT / "principal asset test")[8];
- CGT assets that have been used in carrying on a business through a permanent establishment in Australia;
- an option or right to acquire a CGT asset covered above; or
- a CGT asset that is covered by subsection 104-165(3) of the ITAA 1997, being the choice to disregard a gain or loss on ceasing to be an Australian resident.

A CGT asset is defined as being TARP, which is the key concept used within Division 855 of the ITAA 1997, if it is:[9]

- real property situated in Australia, including a lease of land situated in Australia; or
- a mining, quarrying or prospecting right (to the extent it is not real property), if the minerals, petroleum, or quarry materials are situated in Australia.

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[6] OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS,* 2016, Article 9; See The Treasury, 'Multilateral Instrument' accessed 16 May 2024.
[7] Section 855-15 of the ITAA 1997.
[8] Section 855-25 and section 960-195 of the ITAA 1997.
[9] Section 855-20 of the ITAA 1997.

Whether a non-portfolio membership interest in an entity constitutes an IARPI and is therefore taxable under Australia's foreign resident CGT regime, depends on whether the PAT is satisfied.[10] The PAT is satisfied where more than 50 per cent of the entity's market value is attributable to TARP assets.[11] Currently, the PAT operates as a point-in-time test, at the time of the CGT event.

Foreign resident CGT compliance is supported by a non-final withholding tax that must be remitted by purchasers of covered assets from foreign residents.[12] Purchasers of TARP and IARPI from foreign resident vendors are required to withhold and remit to the ATO 12.5 per cent (increasing to 15 per cent) of the transaction proceeds. The vendor receives a credit for that withheld amount in their tax return. Currently, a purchaser does not need to withhold if the foreign resident has provided a vendor declaration to the purchaser that the membership interests to be sold are not IARPI and the purchaser does not know this vendor declaration to be false at the time it is provided.[13]

Implementation details for consultation

The Budget measure was announced to align Australia's foreign resident CGT regime more closely with international tax practice and the taxing rights of Australia as provided in its tax treaties network.

The intended effect is to clarify and broaden the types of assets that foreign residents are subject to CGT on, and improve the integrity of the foreign resident CGT regime.

Within this framework, there are considerations on how best to implement this measure, specifically in relation to indirect disposals of membership interests.

Additionally, we are mindful that in providing certainty on what is TARP, there are related considerations on asset valuations and the need for integrity rules to prevent the circumvention of these changes. The general anti-avoidance rules, and other specific integrity rules, in the tax law will continue to apply.

Clarifying and broadening the foreign resident CGT base

Australia's existing foreign resident CGT base

Australia's narrow CGT base for foreign residents and the absence of a definition of real property within the Commonwealth's tax legislation generates uncertainty and potentially different tax treatment of land-based assets across different Australian States and/or Territories. This reform will address these issues and ensure foreign residents are subject to consistent CGT treatment of these assets across Australia.

Given "real property" is undefined in the tax legislation it takes the ordinary meaning of that term.[14] The technical legal meaning of "real property" is derived from common law and State / Territory property legislation.[15] This technical legal meaning generally encompasses land and assets affixed to the land that qualify as "fixtures" (i.e., part of the land) under common law, as modified by the relevant State and/or Territory legislation.

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[10] Section 855-25 of the ITAA 1997.

[11] Section 855-30 of the ITAA 1997.

[12] Subdivision 14-D of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

[13] Subdivision 14-D of Schedule 1 to the TAA 1953.

[14] Explanatory Memorandum to Tax Laws Amendment (2006 Measures No. 4) Bill 2006, p. 38 [4.28].

[15] Australian Taxation Office Taxation Determination TD 2009/18, *FCT v Resource Capital Fund IV LP* [2019] FCAFC 51 [194].

However, it is not clear whether the ordinary meaning of "real property" is limited to its technical, legal meaning. This has led to increasing uncertainty about which assets should be treated as fixtures and therefore part of the land, including potential inconsistency through the application of different State and/or Territory legislation to determine technical, legal "real property", which apply varying definitions.

For example, statutory severance legislation in some States may establish a specific rule to determine whether an asset is to be treated as a fixture or a chattel (i.e., separate from the land). Compliance cases have arisen where taxpayers have argued that these provisions determine the meaning of "real property" for CGT purposes, with the potential for inconsistent tax treatment on the same type of underlying asset depending on the location of the assets in different States or Territories.

The practical effect is that foreign resident vendors can argue that the satisfaction of the PAT (and whether their membership interest is an IARPI) turns on the asset valuations across different States and/or Territories, by treating the same types of assets as either TARP or non-TARP based on their location. Ultimately, this allows foreign resident vendors to argue that no CGT is payable on a transaction where there is a net capital gain. This type of argument is not available to domestic residents and gives rise to an imbalance in the system – creating distortions that can affect competition, lead to inequitable treatment and continue to undermine Australia's tax base.

> At a high level, statutory severance is where statutory provisions cause an object or right closely connected with (and otherwise forming part of) land, to be owned separately from it (albeit generally owned by the same entity). There are two well-known judgements in New South Wales and Victoria that are relevant for Australian CGT for foreign residents. In these two instances, there were contradictory outcomes with the Victorian decision finding the assets to be chattels (i.e. non-taxable) whereas the New South Wales decision found the assets to be fixtures (i.e. taxable). While the facts and circumstances are always relevant, this nonetheless highlights the uncertainty from an income tax perspective.

At a principles level, the concept of "real property" currently used in the legislation does not adequately capture the broad range of assets with a close economic connection to Australian land and/or natural resources, including, for example, tangible assets such as telecommunications or energy infrastructure and intangible assets such as water rights or pastoral leases. Further details are provided below.

Clarifying and broadening Australia's foreign resident CGT base

The 2024-25 Budget measure clarifies and broadens the CGT base for foreign residents to ensure assets with a close economic connection to Australian land and/or natural resources are appropriately captured within the tax law. This will bring foreign residents' CGT outcomes into closer alignment with international tax best practice and with the tax treatment that already applies for Australian residents, with respect to Australia's unique land and natural resources. It will also ensure foreign residents are subject to consistent CGT treatment of these assets across Australia. The following examples are types of assets with a close economic connection to Australian land and/or natural resources:

- Leases or licenses to use land situated in Australia, including (but not limited to) pastoral leases and licences, for example:
  - an agreement to lease land that is used in a manner that gives rise to the creation of emissions permits;

- Australian water entitlements in relation to land situated in Australia;
- Infrastructure and machinery installed on land situated in Australia, including land subject to a mining, quarrying or prospecting right of an entity, for example:
  – energy and telecommunications infrastructure, such as wind turbines, solar panels, batteries, transmission towers, transmission lines and substations;
  – transport infrastructure, such as rail networks, ports and airports;
  – heavy machinery installed on land for use in mining operations, such as mining drills and ore crushers;
- An option or right to acquire one of the above assets (or similar asset types with a close economic connection to Australian land and/or natural resources); and
- A non-portfolio membership interest in an entity where more than 50 per cent of the underlying entity's market value is derived from the above assets.

It is appropriate to include these assets in the foreign resident CGT base because they derive their economic value from the use of Australian land and/or natural resources. The taxation of these types of assets by Australia, where the associated land or minerals, petroleum or quarry materials are situated in Australia, is consistent with accepted international tax principles.[16] In many instances, these types of assets would qualify as "immovable property" or "property accessory to immovable property" under the OECD Model Tax Convention.[17]

Additionally, including an option or right to acquire any of the above assets addresses an emerging issue where Australian real property can be structured into an option arrangement to manipulate the PAT and obtain a favourable tax outcome on the disposal of membership interests. While options or rights to acquire the other listed CGT assets is TAP, satisfaction of the PAT depends on the value of TARP which is silent on the treatment of options or rights.[18]

This would prevent tax integrity concerns arising from the inconsistent treatment of options within Division 855 of the ITAA 1997. Amending the PAT to ensure that options to acquire TARP assets are included would resolve this issue and supports appropriate taxation outcomes.

It is not proposed to extend the jurisdiction to tax foreign residents on capital gains from the disposal of livestock and equipment used in agriculture and forestry, except to the extent that these assets are installed on land, or are used in carrying on a business through a permanent establishment in Australia.[19] This establishes a suitable balance between protecting Australia's tax jurisdiction for immobile assets and encouraging foreign investment into Australia.

[16] OECD, *Model Tax Convention on Income and on Capital version 2017,* OECD Publishing, Paris, 'Commentary on Article 6', pp 170-172.
[17] OECD, *Model Tax Convention on Income and on Capital version 2017,* OECD Publishing, Paris, Article 6, p. 33.
[18] Section 855-15 and section 855-30 of the ITAA 1997.
[19] OECD, *Model Tax Convention on Income and on Capital version 2017,* OECD Publishing, Paris, Article 6, p. 33.

Economic interests in TARP and other integrity matters

Under the current legislation, it is possible for foreign residents to avoid CGT by selling economic interests in TARP, or rights to future income over TARP, instead of selling the TARP asset directly. For example, by creating a 'total return swap' which may ultimately give rise to a future acquisition of the TARP asset.

With the changes put forward by this measure, a potential behavioural response would be an increase in structuring arrangements in relation to the asset types listed above (or similar asset types with a close economic connection to Australian land and/or natural resources) to avoid CGT.

While we recognise that these types of economic interests are not 'membership interests' and would not constitute IARPI, they nonetheless derive their value from the TARP asset/s they provide economic exposure to.[20]

Similar considerations arise with regards to the valuation of mining, quarrying or prospecting information. Under the current legislation, it is possible for foreign residents to manipulate the value of assets, such as shares in a company that owns mining rights and the related mining information (the latter of which is not a CGT asset[21]). This may lead to the avoidance of taxation on the sale of IARPI.

The general anti-avoidance rules, and other specific integrity rules, in the tax law will continue to apply. Additional integrity rules may also be considered to ensure the policy intent of the reforms is achieved, with TARP assets being appropriately valued by foreign resident vendors.

Questions:

1. We are interested in views on the appropriateness of the policy principle for continuing to exclude economic interests, and whether there would be any unintended consequences from changing the treatment of economic interests in TARP, to ensure they are taxed equivalently in Division 855 of the ITAA 1997 with membership interests in TARP.

2. Are there other consequences of the proposed reforms that raise similar behavioural concerns? Do you consider that additional integrity rules are required to address them, or that the existing general anti-avoidance rules, and other specific integrity rules, provide sufficient protection?

Extending the testing period for the PAT

The intention of the PAT for the sale of an IARPI is to define when an entity's underlying value is principally derived from Australian real property.

The PAT currently operates at a point-in-time (the time of sale of the IARPI). This point-in-time approach presents an integrity risk as it allows foreign residents to avoid CGT by planning the sale of their membership interests at a time when the underlying entity does not satisfy the test (i.e., does not derive more than 50 per cent of its market value from TARP). This can be achieved, for example, through a corporate restructure immediately prior to the sale of the membership interests.

[20] Section 855-25(1) and section 960-135 of the ITAA 1997.
[21] Australian Taxation Office Interpretive Decision ATOID 2012/13 and Taxation Determination TD 2000/33.

The 2024-25 Budget measure amends the testing period for the PAT to be the previous 365 days before the time of disposal of the IARPI.

This will improve the reliability of the test in determining whether an entity's underlying value is principally derived from Australian real property.

If the underlying entity derives more than 50 per cent of its market value from TARP at the time of testing or at any time during the preceding 365 days, it will satisfy the PAT. This reduces the ability of taxpayers to manipulate the asset composition of the entity in anticipation of a sale to achieve a favourable tax outcome (i.e., to ensure the PAT is not satisfied and therefore CGT is not applicable).

The 365-day test brings Australia's tax law into line with the current OECD Model Tax Convention,[22] the Multilateral Instrument (which affects many of Australia's tax treaties), and Australia's current tax treaty policy. The preceding 365-day terminology was added to the 2017 OECD Model Tax Convention "to address situations where assets are contributed to an entity shortly before the sale of the shares or other comparable interests in that entity in order to dilute the proportion of the value of these shares or interests that is derived from immovable property situated in a Contracting State".[23]

ATO notification of non-IARPI vendor declarations

The 2024-25 Budget measure announced a requirement that a foreign resident vendor disposing of membership interests exceeding $20 million in value must notify the ATO of a vendor declaration they make to a purchaser, that the sale is 'not an indirect Australian real property interest' (non-IARPI). The ATO must be notified by the vendor in an approved form in advance of a set review period before the relevant CGT event or settlement (whichever is earlier).

This notification will provide the ATO with information on high value transactions, addressing current information asymmetries and assisting the ATO to take action to support the collection of CGT liabilities owed by foreign residents. The intention is for the ATO to auto-issue a receipt number, which would be provided to the purchaser with the non-IARPI declaration (the diagram below illustrates this process).

Under the current law, where such a vendor declaration is provided, the purchaser is not required to withhold tax on the sale unless the purchaser knows the declaration to be false at the time it is given.[24] Knowing a declaration to be false requires specific knowledge of the fact (such as the purchaser being party to the fraud committed by the vendor).[25] The practical effect is that, in some cases, foreign residents can incorrectly declare that their membership interest sale is not subject to CGT and pay no tax, without the ATO's knowledge (the example below illustrates this issue). Administrative penalties apply to the vendor for making a false or misleading non-IARPI declaration.[26]

This is a compliance measure that will apply to transactions with a value of greater than $20 million. The aim is to ensure the ATO has visibility over non-IARPI vendor declarations relating to higher value disposals of shares or other membership interests, addressing an information asymmetry and compliance risk that exists under the current settings.

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[22] OECD, *Model Tax Convention on Income and on Capital version 2017,* OECD Publishing, Paris, Article 13(4), pp 37-38.

[23] OECD, *Model Tax Convention on Income and on Capital version 2017,* OECD Publishing, Paris, 'Commentary on Article 13', pp 291-303 [28.5].

[24] Subdivision 14-D of Schedule 1 to the TAA 1953.

[25] Explanatory Memorandum to Tax and Superannuation Laws Amendment (2015 Measures No. 6) Bill 2015, p. 57 [2.83].

[26] Section 14-230 of the TAA 1953.

The measure, as announced, does not seek to alter the current legislation which applies to exclude certain transactions from the existing foreign resident capital gains withholding regime, such as transactions on an approved stock exchange[27], or the non-portfolio interest test which prevents membership interests of less than 10 per cent from being an IARPI.

Example: Incorrect non-IARPI vendor declaration

In the recent court case *Deputy Commissioner of Taxation v State Grid International Australia Development Company Limited* [2022] FCA 139, a foreign shareholder of an Australian energy company was selling their membership interests worth approximately $2.8 billion, resulting in an estimated $220 million of capital gains at risk. The foreign resident entity provided a non-IARPI vendor declaration to the purchaser in respect of the sale, and the purchaser was not required to withhold tax on the purchase price (in line with the current legislation).

However, the ATO became aware of the transaction around the time of the publication of the transaction scheme booklet, which included legal advice that the membership interests "should not give rise to an indirect Australian real property interest".[1] The ATO contested this position.

In preventing the sale proceeds leaving Australia, both the ATO and taxpayer incurred significant transaction costs, specifically the ATO who issued a notice of assessment and successfully obtained urgent freezing orders in the Federal Court the day before the disposal proceeds were due to be remitted offshore.

Notification requirement considerations

The $20 million threshold has been identified as a bright-line test to ensure the measure is targeted at transactions which present a higher risk to revenue.

A set review period addresses the need for market certainty in ATO notification requirements. For example, a 28-day review period would reduce the compliance impost on foreign resident vendors, in advance of a transaction. However, a longer review period, such as 45 or 60 days, would further enhance the ATO's ability to review these vendor declarations before the CGT event or settlement, better protecting the integrity of the withholding regime.

This requirement is not intended to delay commercial transactions on the basis that the high value transactions in scope would generally be expected to be planned well in advance of the settlement date. Ultimately, the $20 million threshold and set review period are intended to balance compliance cost considerations with ensuring the appropriate integrity parameters.

Under this process, if the ATO disagrees with a vendor declaration (once notified), the ATO can make a recommendation to the vendor and the purchaser that the vendor declaration be withdrawn, such that withholding applies to the transaction. The ATO would need to take this action within the set review period, after notification (being the earlier of the CGT event or settlement). Any recommendation by the ATO may need to be considered by the purchaser. If there is any doubt that withholding will occur, the ATO can still apply existing powers as appropriate, including issuing a special assessment to the vendor; or applying for a freezing order in relation to the purchase price or assets to support the relevant tax owed.

As a general point, in the absence of ATO intervention within the review period, the purchaser can rely on the vendor declaration.

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[27] Section 14-200(1) and section 14-215 of the TAA 1953.

Questions:

3. Treasury is interested in views on the appropriateness of the $20 million threshold, and whether there may be any unintended consequences, noting the considerations outlined above.

4. Similarly, we are interested in views on the appropriate timeframe with which foreign resident vendors will be required to notify the ATO in advance of a transaction (i.e., the set review period), noting the policy intent, as outlined above.

5. What information should the purchaser be required to consider, and when, in determining whether a declaration is false (and if so, to withhold)? We also welcome views on whether not knowing the declaration to be false at the time the declaration is given to the purchaser remains the appropriate threshold, in light of the new ATO notification process?

6. Are the current administrative penalties for the failure to lodge an approved form and for providing a false and misleading vendor declaration sufficient for ensuring compliance with the new requirements? If not, what is an appropriate level? This question should be considered in the context of the threshold identified at question 3 above.

7. How can the approach to this new process assist the purchaser in complying with their obligations, including clarity on when to withhold?

Diagram: Vendor non-IARPI declaration – Amended process