REAL PROPERTY CHANGES: RISK MANAGEMENT TIPS FOR SOLICITORS

By Lucy Williams

Changes concerning foreign residents

Foreign resident capital gains withholding payment

New withholding requirements for purchasers of real property in Australia commenced on 1 July 2016. The Federal Government withholding tax is brought in by the Tax and Superannuation Laws Amendment (2015 Measures No. 6) Act 2016 (Cth). It amends schedule 1 to the Taxation Administration Act 1953 (Cth).

The reasoning behind the legislation is to capture some of the tax payable on capital gains by foreign residents. That tax has historically been difficult to recover after they have sold a property from off shore.

A purchaser of a relevant CGT asset is required to withhold 10 per cent of the sale price (or another amount specified) of the purchase price of the asset and remit that amount to the Australian Taxation Office (ATO). Failure to do so renders the purchaser liable to penalties and interest. A CGT asset is a relevant asset if the withholding is defined as taxable Australian real property or an indirect Australian real property interest.

There are exclusions for real property or indirect real property interests in respect of the taxable value of all Australian real property interest. (For more information see: www.ato.gov.au). Foreign persons are also no longer entitled to the 12-month deferral of payment of stamp duty on off-the-plan purchases of residential property.

The surcharge applies to landholder transactions if:

- there is a landholder duty liability;
- one or more of the persons purchasing the interest is a foreign person; and
- at least part of the property owned by the landholder is residential land.

A term is now implied in all NSW land sale contracts entered into after 1 July 2016 obliging a vendor to serve a land tax certificate on the purchaser at least 14 days before completion. The purchaser does not have to complete the certificate or as prescribed by regulation 8A of the Conveyancing (Sale of Land) Regulation 2010, clause 4.4 and by the Taxation Administration Amendment (Collection and Disclosure of Information to Commonwealth Bill) 2016. All persons involved in the purchase of residential property by a foreign vendor considers whether there are sufficient funds to discharge any mortgage or security and to also pay the 10 per cent withholding amount. If not, the mortgagor may refuse to discharge the mortgage and the settlement may be jeopardised.

When acting for a vendor, the solicitor should advise the purchaser that if the vendor fails to provide a clearance certificate before completion, the vendor’s obligation to withhold arises even if the vendor is in fact an Australian resident or would otherwise be entitled to a CGT exemption.

For indirect Australian real property interests, these include a considered foreign resident unless they obtain a clearance certificate (even if they are actually Australian residents for other income tax purposes). For indirect Australian real property interests, a purchaser must determine whether or not a vendor is a foreign resident based on:

- whether they have received a relevant declaration which they do not know to be false; or
- if they know, or have reasonable grounds to believe, the vendor is a foreign resident.

All requirements are satisfied when the purchaser must remit to the ATO 10 per cent of the first element of the property’s cost base (the purchase price in most cases) to the vendor. A request may be made to the ATO to withhold less than 10 per cent of the sale price.

A solicitor acting for the vendor should ensure that the sale contract provides for the vendor to attach a ‘clear’ land tax certificate and if the certificate discloses non-compliance, advise the purchaser of its rights and obligations under the legislation. (L3)

Land tax change – clearance certificate

Unpaid land tax is a charge on land (and a defect in vendor’s title). In New South Wales, the practice was for purchasers of land to obtain a land tax certificate before completion to ensure there is no charge on the land. Under clause 16.6 of the 2014 New South Wales Standard Contract, if a purchaser served a land tax certificate on a vendor showing a charge on any land, on completion the vendor had to give the purchaser a clear land tax certificate (to remove any defect on the vendor’s title). This provision is not included in the 2016 edition.

From 1 July 2016, New South Wales entered into agreement with the Commonwealth to establish the National Register of Foreign Ownership of Land Titles. The CSR is to collect and pass to the ATO information on nationality, citizenship details of buyers of land and additional vendor details (through changes to the Conveyancing (Sale of Land) Regulation 2010, clause 4.4 and by the Taxation Administration Amendment (Collection and Disclosure of Information to Commonwealth Bill) 2016. All terms in this contract are in compliance with the ATO if the certificate discloses non-compliance, advise the purchaser of its rights and obligations under the legislation. (L3)

A term is now implied in all NSW land sale contracts entered into after 1 July 2016 obliging a vendor to serve a current land tax certificate on the purchaser at least 14 days before service...