

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Income Tax Assessment Act 1997

Tax Agent Services Act 2009

*Tax Laws Amendment (Foreign Resident Capital Gains Withholding Payments)
Regulation 2016*

The *Tax Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Regulation 2016* (the Regulation) makes amendments to the *Income Tax Assessment Regulations 1997* (ITAR) and the *Tax Agent Services Regulations 2009* following the introduction of the foreign resident capital gains withholding regime.

Under the foreign resident capital gains withholding regime (see Subdivision 14-D of Schedule 1 to the *Taxation Administration Act 1953* (TAA)), from 1 July 2016, purchasers of certain Australian assets are obliged to withhold 10 per cent of the purchase price of the asset on settlement where they have purchased the property from a foreign resident, and to remit this amount to the Commissioner of Taxation (the Commissioner). Australian resident vendors can apply to the Commissioner for a clearance certificate indicating that the withholding is not required.

A number of transactions are excluded from the scope of the foreign resident capital gains withholding regime. These include ‘on-market transactions’, which are transactions that are conducted on an approved stock exchange. This is because the nature of these transactions makes it impossible for a purchaser to determine the identity and residency status of their counterparty. Schedule 1 to this Regulation adds Chi-X Australia Pty Ltd (Chi-X) to the list of approved stock exchanges, so that transactions conducted on Chi-X fall within the on-market transactions exception.

The Regulation also exempts, for a limited time, conveyancers who perform certain services in relation to the making of payments under the foreign resident capital gains withholding regime from the *Tax Agent Services Act 2009* (the TASA).

These changes were assessed as having a low compliance cost.

Prescribing Chi-X as an ‘approved stock exchange’

Item 1, Schedule 1 – *Income Tax Assessment Regulations 1997*, Schedule 5

Section 909-1 of the *Income Tax Assessment Act 1997* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Item 1 of Schedule 1 to the Regulation inserts Chi-X Australia Pty Ltd into Schedule 5 to the ITAR. Inserting Chi-X into Schedule 5 means that Chi-X falls within the definition of approved stock exchange in subsection 995-1(1) of the Act. This has the effect that ‘on-market transactions’ undertaken on Chi-X are not caught by the foreign resident capital gains withholding regime, and that transactions on Chi-X are treated consistently with transactions on other approved stock exchanges.

Subsection 995-1(1) of the Act defines an approved stock exchange as a stock exchange named in the regulations. Currently, the ITAR prescribes the following as approved Australian stock exchanges for the purposes of the Act:

- Asia Pacific Exchange Limited
- ASX Limited
- National Stock Exchange of Australia Limited; and
- SIM Venture Securities Exchange Ltd.

Prescribing Chi-X as an approved stock exchange was suggested by stakeholders in the course of public consultation on the foreign resident capital gains withholding regime in 2015. Chi-X was also consulted on this change.

Temporary exemption from the *Tax Agent Services Act 2009* requirements for conveyancers providing certain services

Item 2, Schedule 1 – *Tax Agent Services Regulations 2009*, after paragraph 13(1)(k)

Section 70-55 of the TASA provides that the Governor General may make regulations prescribing matters required or permitted by the TASA to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the TASA.

Under section 50-5 of the TASA, any entity that provides a tax agent service and charges or receives a fee or other reward for providing that service must be registered with the Tax Practitioners Board.

Section 90-5 of the TASA provides that a tax agent service is, amongst other things, any service that relates to representing an entity in their dealings with the Commissioner of Taxation, that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

- to satisfy liabilities or obligations that arise, or could arise under a taxation law; and
- to claim entitlements that arise, or could arise, under a taxation law.

Subsection 90-5(2) provides for regulations to specify that a service is not a tax agent service for the purposes of the TASA.

The Australian Taxation Office is developing various forms in preparation for the commencement of the foreign resident capital gains withholding regime. During consultation on these forms it became apparent that providing a service that included completing the forms could constitute a tax agent service within the meaning of section 90-5 of the TASA. Consequently, conveyancers, who are not currently required to be registered under the TASA, would be required to register as tax agents if they wished to provide the service of completing these forms.

The purpose of this amendment is to ensure that conveyancers who remit amounts to the Commissioner and complete the less-complex purchaser payment notification form are not providing a tax agent service under the TASA. This is to be achieved by

the addition of an item to the list of services specified in regulation 13 of the *Tax Agent Services Regulations 2009* not to be a tax agent service. As the foreign resident capital gains withholding regime commences on 1 July 2016, this exemption reduces the compliance burden placed on conveyancers.

The exemption is provided for a service provided by a person licensed or registered under a law of a State or Territory to carry on a conveyancing business, or a business as a settlement agent or conveyancing agent, to the extent that it involves or relates to remitting to the Commissioner amounts withheld under section 14-200 of Schedule 1 to the TAA.

Item 3, Schedule 1 – *Tax Agent Services Regulations 2009*, Paragraph 13(1)(ka)

The exemption in Item 2 of Schedule 1 is provided until 1 January 2018. This will allow sufficient time for administrative solutions to be developed so that, in most cases, the completion of this form will not be a tax agent service. Consequently, Item 3 of Schedule 1 to the Regulation serves as a sunset clause.

Consultation was undertaken in relation to these amendments with the Tax Practitioners Board and the conveyancing industry.

The relevant Acts do not specify any conditions that need to be satisfied before the power to make the proposed Regulation may be exercised.

The Regulation is an instrument for the purposes of the *Legislation Act 2003*.

Item 1 of Schedule 1 to the Regulation commences on 1 July 2016.

Item 2 of Schedule 1 to the Regulation commences on the day after registration.

Item 3 of Schedule 1 to the Regulation commences on 1 January 2018.

Statement of Compatibility with Human Rights

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

Tax Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Regulation 2016

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

Item 1 of Schedule 1 to the *Tax Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Regulation 2016* (the Regulation) prescribes Chi-X Pty Ltd as an approved stock exchange so that transactions that take place on Chi-X fall within the ‘on-market transaction’ exemption from the foreign resident capital gains withholding regime that applies from 1 July 2016.

Items 2-3 of Schedule 1 to the Regulation have the effect that conveyancers who perform certain services in relation to the making of payments under the foreign resident capital gains withholding regime are exempted from the *Tax Agent Services Act 2009* for a limited time.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights.