9 June 2017

Mr. Mark Fitt
Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam,

Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Bill 2017

The Electronic Conveyancing Group (**ECG**)[1] is grateful for the opportunity to comment on the Treasury Laws Amendment (Foreign Resident Capital Gains Withholding Payments) Bill 2017, proposing changes to existing legislation relating to the Foreign Resident Capital Gains Withholding (**FRCGW**) Tax, as to both rate and threshold.

The effects of those proposed changes are to alter the threshold for the application of the regime from its current figure of $2,000,000.00 to $750,000.00, with changes applying from 1 July 2017. We also note the increase in the withholding rate from 10 per cent to 12.5 per cent.

The ECG appreciates the obligation for government to preserve the integrity of its revenue base and acknowledges the requirement of government to ensure compliance by foreign investors with the Australian Capital Gains Tax Regime.

It, however, remains very concerned that the reduction of the threshold from its current $2,000,000.00 amount to $750,000.00 creates compliance and regulatory obligations upon the vast majority of participants in transactions which do not involve a foreign investor sale.

Concern in Regulatory and Compliance Burdens

We note that when the Discussion Paper introduced by Treasury in October of 2014 was prepared, it noted in particular at Paragraph 12 of the paper (on page 2), the following;

> *"In designing the non-final Withholding Tax Regime, Treasury is mindful of the government's broader de-regulation agenda and* ***the importance of minimising red tape and the compliance burden on businesses and individuals"*** **(emphasis added)**

[1] Disclaimer: Please note that this is a submission on behalf of the Australian Institute of Conveyancers National and the Law Council of Australia. The Australian Bankers' Association was not in a position to provide input to the submission.

The Law Council Submission to Treasury of 12 August 2015 also considered the issue as follows:

> *"While respecting the obligation of government to preserve its revenue base, the Committee are very concerned that the proposed regime will lead to increased compliance costs, market distortions, uncertainty for lenders, increased expense of standard transactional and commercial practice, and the introduction of a new and complex bureaucratic regime"*

Policy as to the Threshold

The policy position that was pressed by Treasury in the introduction of the measure, prior to the Budget announcement, noted that the regulatory and compliance obligations would only relate to transactions at more than $2,000,000.00. Acceptance of the threshold at that level recognised an appropriate balancing between the cost of compliance across the community and the economy, as a proportion of the costs of the transaction, and the capacity to recover revenue appropriately.

The previous threshold was designed to regulate the sale of premium residential properties, or commercial properties, where advisors are skilled, familiar and capable of providing advice in relation to compliance, and the cost of that advice can be appropriately absorbed. However, the reduction of the threshold from $2,000,000.00 to $750,000.00 effectively changes the underlying premise upon which the legislation is based. Under the proposed new threshold private consumers and small business will primarily be affected.

We are particularly concerned that the costs of compliance, the increase in regulation and the introduction of a new bureaucratic regime to a significant number of previously unaffected transactions means that property transfers become more expensive, time consuming, and bureaucratic and will have an adverse effect on housing affordability. We expressed the view at the time the FRCGW regime was first proposed that it was unlikely to be cost effective when the compliance burden is taken into account. We have not seen any evidence to change this view. Indeed our understanding is that gross revenue receipts are substantially lower than predicted and this is before FRCGW credits may be claimed by foreign residents in the tax returns for the year ending 30 June 2017.

The ECG considers that:

- The reduction of the threshold to the proposed $750,000.00, does not correctly balance the competing interests that were identified by Treasury in its original consideration of the measure. The proposed reduction in the threshold will increase the compliance costs for a percentage of property sale transactions (for example, up to 50-60 per cent property sale transactions in NSW).[2] Furthermore, the cost burden will be proportionally higher as a proportion of the sale price of what is the median price for properties in the 3 largest capital cities.

- The FRCGW regime should not be extended until a comprehensive cost benefit analysis is carried out and published, demonstrating that the FRCGW regime for 2017 is cost effective and the proposed extension of it is also cost effective. In both cases, the test of cost effectiveness should apply to both government and the community (having regard to the compliance costs).

[2] Based on figures supplied to the ECG by the Real Estate Institute of Australia.

Whilst we appreciate the matter has been announced as part of the Budget 2017 initiatives, there is also a particular concern by our members in relation to what arrangements are to be made for transitional purposes, and the resourcing and logistic issues associated with a substantial increase in the requirements of the issuing of clearance certificates, including the "one off" uptake requirements, all of which will occur at a traditionally significant part of the financial year.

The ECG remains very concerned about the consequences if the legislation is not in force on 1 July 2017. On that day a purchaser will only be entitled at law to withhold 10 per cent of the price for properties having a sale price of $2,000,000.00 or more but will be legally obliged to pay the Commissioner of Taxation the FRCGW of 12.5% per cent of the sale price of properties having a sale price of $750,000.00 or more if the legislation is subsequently brought into force and has retrospective effect from 1 July 2017 (as it is currently drafted). There is no simple means for the parties to practically and safety quarantine the required funds for the possibility that the legislation may at some indeterminate time come into effect with retrospective effect.

We accept that setting the rate of the FRCGW is a matter for government except where the rate has distorting effect on the manner in which transactions are conducted. We do not believe that the rate increase proposed does so. We accept the principle that it is the role of government to decide on what is taxable, how taxation is undertaken and the rate of taxation. However, the ECG is of the view that in this case government has not demonstrated the FRCGW regime and its proposed extension is cost effective, and that it has underestimated the initial ongoing compliance cost to the community. Therefore, the proposed legislative change should be delayed.

It is not the role of the ECG to be concerned regarding the FRCGW regime in respect of indirect taxable Australian real property interests, but we expect the compliance costs for what is presumably only an anti-avoidance measure, to be considerably higher.

The ECG would be willing to engage in further consultation with the Committee if required. In the first instance please contact Mr Murray McCutcheon AM, Chair at [redacted]

Yours faithfully,

Electronic Conveyancing Group

[redacted]

Murray McCutcheon AM
Chair