



Law Council
OF AUSTRALIA

Business Law Section

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Thang Luong
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Australian Taxation Office

By email: thang.luong@ato.gov.au

Dear Thang,

Feedback requested from ATO - draft Legislative Instrument (Variation 2020/D1) applicable to mortgagees - Foreign Resident Capital Gains Withholding process

Thank you for the opportunity to provide comments in respect of Variation 2020/D1.

The Taxation Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcome the new variation instrument, particularly now that the COVID-19 pandemic may result in a sharp rise in the number of mortgagees exercising their power of sale. However, the Committee considers that it would be appropriate to expand the scope of the variation to the significant number of non-bank (non-ADI) lenders in the market.

The Explanatory Statement to the Variation 2020/D1 explains that the purpose of the instrument is:

... to provide certainty for purchasers and mortgagees in the relevant transaction that no amount is required to be withheld where there is no residue that will be payable to the mortgagor. This instrument will ensure there are no unintended consequences for the parties in a conveyancing process in the event that failure to obtain a variation results in delay or failure to complete settlement.

The Committee agrees that it is appropriate for the Commissioner to seek to address the above purpose as proposed in the draft variation instrument. However, the Committee considers that the scope of the instrument is too limited to fully achieve its purpose because it only applies to ADIs.

The Reserve Bank of Australia (**RBA**) has recently stated that residential mortgage lending by non-banks is estimated to have been growing much faster than the rate of banks' mortgage lending over the past three years. Over that same time, non-bank lending for property development has also increased significantly (see RBA Financial Stability Review – April 2019: < <https://www.rba.gov.au/publications/fsr/2019/apr/box-d.html>>). Non-bank lenders are also very active in general commercial lending, often backed by real property mortgages.

Given that non-bank lenders make up a significant and important (and growing) part of the Australian lending sector the Committee considers that they should also be covered by the Variation 2020/D1.

The Committee does not see any good policy reason to exclude non-bank lenders from the scope of Variation 2020/D1.

The Committee considers that a better mechanism to ensure that Variation 2020/D1 is appropriately targeted, while protecting the integrity of the tax system, would be for the variation to modify the definition of 'mortgagee' as follows:

Mortgagee - a mortgagee in relation to the land that **also carries on a 'business of lending money' within the meaning of those words set out in section 25-35 of the *Income Tax Assessment Act 1997* (about deductions for bad debts) ~~an 'authorised deposit-taking institution' as defined in section 5 of the *Banking Act 1959*.~~**

The Committee expects that such an approach would address any integrity concerns and provide comfort that only legitimate lenders would qualify for the variation.

If you have any questions please contact the Chair of the Taxation Law committee, Clint Harding, at charding@abl.com.au.

Yours sincerely,

A handwritten signature in black ink that reads "Greg Rodgers". The signature is written in a cursive, flowing style.

Greg Rodgers
Chair, Business Law Section