Tax Insights

Judicial developments in the taxation of non-resident investors in Australia

The taxation of non-resident investors exiting Australian investments has been a hot topic in recent times, given announced but unenacted legislative change, a proactive tax administration taking action even before an exit transaction has been executed, and a number of relevant, albeit inconsistent, judicial decisions.

Prior to the decisions of the Federal Court of Australia in *YTL Power Investments Limited v Commissioner of Taxation [2025] FCA 1317* (YTL Power) (Hespe J) and *Newmont Canada FN Holdings ULC v Commissioner of Taxation (No 2) [2025] FCA 1356* (Newmont) (Colvin J) discussed below, non-resident investors have had to reconcile three existing judicial decisions, none of which were specifically made in the context of Australia's capital gains tax (CGT) rules.

The YTL Power and Newmont decisions provide critical guidance, with particular relevance to the power and utilities sector and infrastructure more broadly. Both judgments apply a consistent interpretative approach to Division 855. Indeed, Colvin J notes in Newmont that:

> *"YTL Power ... dealt with a number of legal points that have also been addressed in these reasons. I have considered her Honour's reasons. In my respectful view they accord with conclusions I have reached."*

Further details on the context, background and detail of these decisions are highlighted below, as they relate to physical assets. Newmont also provides detailed commentary on the treatment of mining tenements and how to approach characterising legal rights as property or personal, which are not the subject of this article.

Context of decisions

The judicial position as it existed prior to YTL Power and Newmont is briefly summarised in the table below.

Decision	Asset	Statutory context	Conclusion
AWF Prop Co 2 Pty Ltd v Ararat Rural City Council [2020] VSC 853 (and on appeal, *Valuer-General v AWF Prop Co 2 Pty Ltd* [2021] VSCA 274))	Wind-farm infrastructure in Victoria consisting of a long-term leasehold plus towers, turbines, concrete foundations and underground cables	Decision focused on whether chattels, or fixtures should be included when calculating the capital improved value of the leased land for the purpose of rates assessments under the *Valuation of Land Act 1960* (Vic)	Assets held to be **chattels** (i.e. not fixtures) by the Victorian Supreme Court of Appeal
SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 395 (SPIC)	Wind-farm (75 turbines) on leased land in New South Wales (NSW)	Decision focused on whether the assets were fixtures that were to be included in calculating landholder duty under the *Duties Act 1997* (NSW)	Assets held to be **fixtures** by the NSW Supreme Court
Conexa Sydney Holdings Pty Ltd v Chief Commissioner of State Revenue [2025] NSWCA 20	Acquisition of a company owning a 19 kilometre underground recycled-water pipeline in NSW	Decision focused on whether the interest in the pipeline was subject to duty either as an "interest in land" or "goods" within the meaning of s155 of the *Duties Act 1997* (NSW) Asset was subject to statutory severance under the *Water Industry Competition Act 2006* (NSW)	Asset held to be an "**interest in land**" for this purpose by the NSW Supreme Court of Appeal

Key takeaways from YTL Power and Newmont

By way of background, Division 855 Income Tax Assessment Act 1997 provides that capital gains of a non-resident are to be disregarded where the relevant asset is not taxable Australian property (TAP). TAP consists of five separate assets, one of which is relevantly, an indirect Australian real property interest (IARPI). In simple terms, IARPI includes a non-portfolio membership interest in an entity if the sum of the market values of the entity's assets that are taxable Australian real property (TARP) exceeds the sum of the market values of its assets that are not TARP.

TARP is defined to mean:

a) Real property situated in Australia (including a lease of land, if the land is situated in Australia); or

b) A mining, quarrying or prospecting right (to the extent that the right is not real property), if the minerals, petroleum or quarry materials are situated in Australia.

Approach to tax on disposal under current law and meaning of "real property"

YTL Power and Newmont are the first cases to consider in detail the meaning of "real property" in the context of Division 855 and provide helpful clarification that the term is to be interpreted and applied based on its technical legal meaning, supporting more detailed consideration of the legal rights underpinning the ownership of assets. In each of these cases and more broadly, the Commissioner of Taxation ("the Commissioner") has argued for an ordinary and broader meaning, where the nature of the physical assets can be sufficient, even in the absence of the requisite proprietary rights over land.

Statutory severance can be relevant

YTL Power confirms that, because the term "real property" refers to interests or estates in land for general law purposes, it is permissible for Division 855 purposes to have regard to any State statutory severance legislation that might displace the characterisation of a right under the general law. However, the Court observed that section 30 of the relevant South Australian Disposal Act "is not drafted as a deeming provision for a limited purpose" ([187]), indicating that there could be other circumstances where statutory severance provisions have a limited operation and do not affect whether an interest is "real property" for Division 855 purposes. Each provision will need to be considered having regard to its terms and the specific circumstances.

Location may matter

Given the relevance of State law and variance in provisions that may give rise to "statutory severance" as between ownership of the land and ownership of assets on the land, this finding creates the real possibility that the same assets could be characterised as alternatively as fixtures or chattels depending on the State or Territory in which they are located.

Assets on leasehold land

In YTL Power, the statutory provisions had the impact that even assets on land that was owned by ElectraNet were not real property assets. In Newmont, Colvin J set out a principle that while tenants affixing assets to land have a right to remove them at the end of the lease, prior to exercising that right they become part of the freehold (and not the leasehold interest). This meant that they could not be argued to be real property of the lessee, making it unnecessary to undertake the often cumbersome analysis of whether the asset is a fixture or chattel at common law. Should this principle be accepted more broadly it could have significance for infrastructure and renewable energy projects, which are often operated by project entities on leased land.

Separating the valuation and characterisation questions

From a procedural standpoint, YTL Power provides a pathway to streamlining a dispute where characterisation is essential to the outcome. The parties agreed, pursuant to Federal Court Rule 30.01, to separate out three critical questions regarding the characterisation of whether the assets were real property under Division 855 avoiding the need for the Court to hear what would undoubtedly be a lengthy and complex trial involving valuation issues. Evidently, should assets have been found to be real property or leases of land, then the valuation questions would have been required to be determined.

While valuation remains relevant, whether key assets are fixtures or chattels will largely drive whether more than 50% of the market value of the assets are TARP assets. Given the cost and complexity of valuation disputes, this is a welcome development for taxpayers. For example, as the Court observed in Newmont, the valuation questions posed by Division 855 were responsible for having "spawned a complex set of valuation issues as between the … Vendors and the Commissioner." (Newmont, [7]).

Principles of market valuation

The battle of experts was on full display in Newmont, and it is fair to say that the taxpayer's experts were preferred. In Newmont, Colvin J explained the approach to market valuations in the context of Division 855 referring to the approach of the Full Federal Court in RCF III and RCF IV. Colvin J noted that when determining market value, regard must be had to the bundle of assets sold together to the same buyer on the basis that they would be deployed in the mining operations. It is then necessary to allocate that pool to the whole bundle of assets. In respect of mining information which was the subject of some contention, the Commissioner's expert had argued that no buyer would actually pay for this information because they would get what they needed through the due diligence process. Justice Colvin rejected that position, saying it made no sense to assume a purchaser would be given unrestricted access to highly valuable information or that an asset with real value should be treated as worth nothing simply because a buyer might ignore the vendor's rights and misuse the information.

Appeal?

The Commissioner has lodged an appeal against the YTL Power decision. As at the date of publication, the Commissioner has not appealed the Newmont matter: it is understood that the deadline for appealing Newmont is on or about 8 December 2025.

Proposed legislative reform

The Government has announced its intention to "clarify and broaden" the CGT base for foreign investors. A Consultation Paper called *Strengthening the foreign resident capital gains tax regime* was issued by Treasury in July 2024. We continue to await next steps and exposure draft legislation. The current proposal is that the law will apply to CGT events commencing on or after the later of 1 October 2025 or the first 1 January, 1 April, 1 July, or 1 October after the relevant amending Act receives Royal Assent. The lack of "grandfathering" proposed to date has been supported by a suggestion that the changes are a clarification rather than a change of law. YTL Power and Newmont may make that position more difficult to support.

On the other hand, the decisions may create an impetus for further strengthening of the proposed changes. For example, Hespe J noted that "it was … open to the Commonwealth legislature to provide a definition of real property that denied the effect of … the Disposal Act", which it had not done under the current provisions of Division 855. Based on announcements by Treasury (which refer to assets with "an economic connection to Australian land"), the proposed changes are likely to involve the abandonment of the concept of "real property" altogether. However, if the concept is retained in one form or another, it would be necessary to specifically address the effect of statutory severance legislation to achieve the stated objectives of the reforms.

Case note – YTL Power

Background

- The taxpayer, YTL Power Investments Ltd (YTL), held 33.5% of the shares in ElectraNet Pty Ltd (ElectraNet), which operated the electricity transmission network in SA under a combination of leases and licenses.
- YTL disposed of the shares in ElectraNet, resulting in a capital gain of around AUD 948 million. The decision focused on whether the gain on disposal should be subject to CGT.

- Under Division 855, a capital gain made on disposal of a shareholding of 10% or more (having regard to holdings of associates) will be taxable unless 50% or less of the assets of the company based on market value are TARP (an IARPI). Detailed consideration and characterisation of the assets of ElectraNet was therefore required.

- ElectraNet started holding the relevant assets following entry into a series of agreements with the Transmission Lessor Corporation (TLC) that ultimately gave rise to a lease of electricity transmission infrastructure (Leased Assets) granted under the Electricity Corporations (Restructuring and Disposal) Act 1999 (SA) (Disposal Act). These agreements included both:

    - **Network Lease:** A lease of the Leased Assets, with the interests in the underlying land on which the Leased Assets were situated being owned by either TLC, ElectraNet or third parties. The underlying assets included powerlines, substations for converting, transforming or controlling electricity, and wires and other equipment used for or in connection with the transmission of electricity.

    - **Network Land Lease:** Relevantly, at the time of disposal, a grant of a lease of the Transmission Network Land and TLC's interest in certain private easements.

- Relevantly, section 30 of the Disposal Act had the effect of deeming the Leased Assets to be leased to ElectraNet "as if the infrastructure were personal property severed from any land to which it is affixed or annexed and owned separately from the land". As the Court observed in its decision, section 30 had the effect of separating the Network Land Lease and the Network Lease, and deeming the Leased Assets on the TLC land to be personal property.

- The Australian Taxation Office (ATO) issued an early assessment in October 2022 (before YTL lodged its FY22 return). In March 2023, Hespe J dismissed YTL's application for a declaration that it was not liable for capital gains tax for FY22, holding that the issued assessment was conclusive evidence of the liability. As a result, YTL was required to follow the standard objection and appeal procedures rather than seek declaratory relief.

- While the application of Division 855 can involve questions of both characterisation and valuation, the parties requested that three preliminary questions in relation to the three categories of Leased Assets be heard and determined, and this was agreed to by the Court on the basis that:

    > *"if answered affirmatively, the answers would be dispositive of the proceedings without the need for a lengthy trial involving competing valuations and potentially detailed findings of fact relating to individual items of property. In those circumstances, the Court was satisfied that it was in the interests of the efficient administration of justice that the agreed questions be determined as a preliminary matter."*

Decision

Hespe J found in favour of the taxpayer, concluding that the shares were not IARPIs and therefore the gain was not subject to income tax. The key findings are summarised below.

<u>Meaning of real property</u>

Contrary to the Commissioner's submissions, Hespe J held that "real property" has a technical legal meaning and should not be afforded an "ordinary meaning" or dictionary meaning. In this regard, the technical legal meaning of real property is, broadly speaking, an estate or interest in land that could be recoverable by its holder and their heirs in a real action (as distinct from a personal action for damages). Critically to the question of statutory severance discussed below, the Court observed that, "[w]hatever the metes and bounds are of the concept of 'real property', [it] is used in contradistinction to 'personal property'" ([185]).

Hespe J also held that the concept of “real property” is distinct from the concept of “immoveable property” and found that “[t]he fact that many of Australia’s double taxation agreements and Div 855 of the ITAA 1997 deploy the concept of real property rather than immovable property must be taken to be a deliberate choice to invoke the concept of real property” ([133]). Hespe J also referenced the need to include leasehold interests in the definition of “real property” in Division 855 as supporting this point. The *Full Federal Court in Federal Commissioner of Taxation v Resource Capital Fund IV (2019) 266 FCR 1* had previously observed (at [194]) that this legislative amendment was necessary because a leasehold interest is not real property at common law.

Characterisation of tangible assets

The Commissioner submitted that, to the extent the Leased Assets were affixed to the land, they should be regarded as part of the land and therefore “real property” based on the common law doctrine of fixtures. Relevantly, however, Hespe J held that items affixed to land do not become, merely because of their affixation, “fixtures” in the technical sense.

Importantly, whether rights enjoyed over assets can be characterised as “real property” or a “lease of land” is to be determined by reference to the nature of the rights granted over those assets, rather than general law principles applicable to tenant’s fixtures ([148]). This is because affixation of an asset does not result in the creation of an interest in land that is separate from the lessee’s leasehold’s interest ([145]).

Assets affixed to land the subject of rights held by the test entity may have the character of real property if those rights themselves have the character of real property. For example, as explained below, the rights over the assets on land owned by third parties were statutory access rights, not real property interests, and it did not matter that the assets were “affixed” to the land or “fixtures”.

The approach in YTL Power is consistent with Hespe J’s observation (at [135]) that the term “real property” in the context of Division 855 “does not refer to the physical attributes of an item” and instead refers to the estate or interest of an entity, emphasising that the focus is on the rights over an asset rather than its relationship with, or connection to, land.

It also follows the NSW Supreme Court’s reasoning in *Meridian Energy Australia Pty Ltd v Chief Commissioner of State Revenue [2022] NSWSC 1074* (Meridian), where the Court disregarded the application of general law principles relating to tenant’s fixtures and had regard to the statutory source of rights over the relevant assets. It found that those rights had transformed the assets from real property into “sui generis” property (i.e. “of its own kind” and not “land” for NSW landholder duty purposes) ([136]-[143]). While Meridian concerned only statutory rights, YTL Power indicates that this approach is suitable in a broader context and when applying Division 855.

YTL Power represents a departure from the approach generally taken in other cases involving the characterisation of assets as “fixtures” or “real property” in various legislative contexts (for example, for the purposes of determining a liability to landholder duty, fire services levies and other rates and taxes).

Three categories of Leased Assets

- **Land owned by third parties** (the first preliminary question): The infrastructure was situated on land over which ElectraNet had statutory access rights, such as statutory easements. As those rights did not amount to an interest in land, they were not real property. It was relevant that rights were not exclusive, they conferred a limited right of occupation for statutory purposes, and therefore there were certain limitations on how the rights could be exercised by ElectraNet.

- **Land owned by TLC** (the second preliminary question): Although the Land Lease might have been real property, the statutory severance regime in the Disposal Act had the effect of treating these assets as personal property for the purposes of the South Australian general law. The assets were therefore necessarily not real property, and the rights held by ElectraNet were not a lease of land for Division 855 purposes.

- **Land belonging to ElectraNet** (the third preliminary question): The infrastructure was situated on land belonging to ElectraNet, but the nature of the arrangements meant that those rights did not constitute a separate interest in land for ElectraNet. That is, ElectraNet's rights over the assets under the lease of infrastructure did not merge with its separate interest in land. Hespe J held that, even if there was such a merging of rights, the Disposal Act would deem those assets to be personal property in the same way it deemed the assets situated on TLC's land to be personalty.

Case note – Newmont

Background

- The taxpayers, Newmont Canada FN Holdings ULC (Newmont Canada) and Newmont Capital Limited (Newmont US) (together, the Vendors), held ~16% and ~13% of the shares in Newmont Australia Pty Ltd (Newmont Australia), respectively.
- The Vendors sold their shares in Newmont Australia to the third shareholder of Newmont Australia, Newmont Australia Holdings Pty Ltd (Newmont Australia Holdings), which held ~71% of the shares, and realised a capital gain from those sales.
- Newmont Australia and its subsidiaries operated four gold mining operations in Australia (three in Western Australia and one in the Northern Territory) and was involved in the mining, processing and production of gold at those mines. Relevantly, Newmont Australia's assets comprised plant and equipment, mining information and the following assets:
    - Mining tenements granted under the Mining Act 1978 (WA) (including mining leases, general purpose leases, miscellaneous licences) and the Mining Act 1980 (NT) (including mineral leases); and
    - Mining tenements in respect of land located in NSW and Queensland, including mineral development licenses.
- In some cases, the mining tenements were held by Newmont Australia and its subsidiaries; in others, the mining tenements were held by third parties who subleased the tenement or granted access rights over the relevant land to Newmont Australia and its subsidiaries. Newmont Australia also had freehold or leasehold interests in the land where some of its mining plant and equipment was located.
- The Court was required to consider 23 issues for determination. 14 issues concerned the approach to ascertaining the market value of various assets held by Newmont Australia, 5 concerned the meaning of, and characterisation of assets as, "real property", and 4 concerned the application of tax rules relating to cost base, market value substitution and arm's length market value. Our observations on Newmont below focus on the characterisation issues, which were also relevant in YTL Power.
- From a procedural standpoint, Newmont involved complex valuation questions, voluminous expert evidence, extensive findings of fact and no "preliminary questions". However, the way the taxpayers' case was argued in Newmont was not in principle dissimilar to YTL Power. The parties listed the main issues for determination and the resolution of those issues would "enable final calculations to be undertaken [by a suitable referee] in order to determine the market values in dispute between the parties [and the TARP calculation]" ([13] and Appendix).

Decision

As the matter was referred to a referee to determine the market values of Newmont Australia's assets, no finding has been made about whether the shares in that entity were IARPIs. Colvin J's key findings in relation to the characterisation issues are summarised below.

Meaning of real property

Colvin J addressed the Commissioner's argument, also made in YTL Power, that the term "real property" in Division 855 has an ordinary meaning. Colvin J held that, while the ordinary meaning of "real property" connotes land and things erected on or attached to land, the term instead bears its narrower legal meaning (described above), and has been extended in Division 855 to include leases of land. Colvin J's reasoning is similar to and reinforces Hespe J's reasoning in YTL Power.

Real property does not extend to all intangible rights affecting land

Because of how this issue was resolved, it was not strictly necessary to address the Commissioner's separate submissions about how plant and equipment and intangible rights to exploit land should be characterised assuming that "real property" does have an ordinary meaning. In relation to intangible rights, the Commissioner argued that intangible rights to exploit land (or rights, powers and privileges to do with land) should come within the meaning of Division 855 "real property".

In obiter comments, Colvin J observed that he would have found Newmont Australia's plant and equipment to be "real property" according to its ordinary meaning because it was erected or attached to land. Colvin J concluded, contrary to the Commissioner's submission, that neither the ordinary nor technical meaning of "real property" includes all intangible rights to exploit land and the terminology "right, power or privilege to do with land" is not encapsulated by the Division 855 concept of "real property".

Characterisation of tangible assets

The Commissioner had submitted that Newmont Australia's freehold or leasehold interest in land and the status of the relevant plant and equipment as fixtures on that land according to general law principles meant that the plant and equipment was "real property". As noted above, the Commissioner made the same argument in YTL Power.

However, the Court rejected this, holding (following TEC Desert) that the status of the mining plant and building was determined by the status of the source of the authority to place and affix the mining equipment on the land. That source of authority was the mining tenements, and these are personalty ([644]-[646] and [671]-[673]). It did not matter that Newmont Australia had a freehold or leasehold interest over the land where the plant was situated, as these interests were not the source of the rights to use and bring the mining plant onto the land. This is consistent with the approach in YTL Power of focusing on the source of rights over an asset.

Leasehold fixtures

Significantly, the Court clarified the proper characterisation of items affixed to land that is subject to a lease. The Court observed that assets annexed to land during a lease and made fixtures (i.e. tenant's fixtures) become part of the freehold, not the leasehold. While they can be severed from the land during the term of the lease and transformed back into chattels, they remain part of the freehold while annexed to the land ([653] and [669]).

Arm's length dealings

The Court reinforced the well-settled principle that related parties may deal at arm's length, but found in this case that the parties' relationship and their efforts to obtain a third-party valuation of the shares demonstrated that they were not dealing at arm's length as this was "a mechanism that is designed to address the fact that there has been no arm's length negotiation of the price to be paid". Therefore, the market value substitution rule applied to set the capital proceeds for the Vendors at the market value of the shares.

Valuations

The Court rejected the Commissioner's expert Mr Lonergan. The Court noted that while Mr Lonergan was an experienced valuer, his experience and understanding of gold futures and forward markets and his specialist experience in mining plant, equipment and information was at issue. "The independence of his opinions was also challenged" [118]. In valuing the gold price for the purposes of the discounted cash flow analysis, the Court preferred the taxpayers' expert's approach as best reflecting how market participants would have valued gold at the time of the transaction. The Court accepted the approach by the taxpayer's experts in valuing mining information and adopted a similar approach to the valuing of the intercompany loans and receivables. Justice Colvin considered that as a matter of law, "consideration of the extent to which the value of particular assets might be affected by the fact that they were to be acquired as part of a hypothetical sale to a purchaser who was also acquiring the shares in subsidiaries where some assets may arise from intercompany dealings between the subsidiaries. Which is not to say that assets and liabilities of subsidiaries are simply to be netted off" [521]. Justice Colvin found such an approach would be contrary to the terms of section 855-30. The Commissioner also argued that Newmont (taxpayer) failed to discharge their onus by relying upon values from the key figures taken from different experts. The Court firmly rejected this contention by the Commissioner on the basis that the process and overall result was thoroughly tested and a sensibility check "exposing the possibility of error in the inputs" had been performed. The Court accepted the taxpayers' experts on most matters outlining the importance of experts in valuation disputes.

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Contacts

Sharon Murray
Partner
Tel: +61 3 9671 7939
sharmurray@deloitte.com.au

Aaron Khoury
Partner
Tel: +61 3 9671 8657
aarkhoury@deloitte.com.au

Richard Buchanan
Partner
Tel: +61 3 6337 7113
ribuchanan@deloitte.com.au

Matthew Gould
Partner
Tel: +61 3 9671 8628
mgould@deloitte.com.au

Richard Lambkin
Partner
Tel: +61 2 9322 5788
rlambkin@deloitte.com.au

Craig Saunders
Partner
Tel: +61 3 9671 6812
crsaunders@deloitte.com.au