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Tax Insights

Draft foreign resident CGT legislation would introduce retrospective law changes

On 10 April 2026, the Australian government released exposure draft legislation proposing changes to the foreign resident capital gains tax (CGT) regime that were first announced in May 2024 as part of the 2024–25 Federal Budget. Despite the importance and breadth of these changes, the consultation period closes on 24 April 2026. Given the short time frame for submissions, Deloitte Australia clients are encouraged to provide feedback by contacting their Deloitte Australia client service teams as early as possible.

The proposed changes include:

- **Retrospective amendments (as from 12 December 2006)** to the definition of taxable Australian real property (**TARP**) to:
    - Remove the impact of state and territory law; and
    - Include "things" (or combinations of things) fixed to land that are reasonably expected to be situated on the land for the majority of their useful life, whether or not they are fixtures, and leases over such items;
- **Prospective broadening of the TARP definition** to include water rights, mining information, licences, and contractual rights exercisable over land or fixed assets;
- A **prospective treaty override**, defining "real property" or "immovable property" in Australia's tax treaties by reference to the domestic definition of TARP as amended by these changes;
- A **limited renewable energy concession**, reducing the tax rate by 50% on certain qualifying disposals undertaken by foreign residents between commencement and 30 June 2030;

- A **prospective 365-day look-back period for the principal asset test**, comparing the market value of TARP assets to non-TARP assets;
- A new **prospective notification regime** requiring reporting of transactions above **AUD 50 million** where a non-TARP declaration would otherwise be made; and
- **Increased prospective obligations on purchasers** to objectively test whether a vendor's declaration could reasonably be concluded to be false, rather than looking only to subjective knowledge.

Aside from the retrospective amendments to the definition of TARP, the remaining proposed amendments to Division 855 of the Income Tax Assessment Act 1997 (ITAA 1997) ("Division 855") are to apply to CGT events happening on or after commencement (being the start of the first quarter after Royal Assent). Deloitte Australia expects that the bill for these measures will be progressed through parliament during the May and June sittings, to commence on 1 July 2026.

Illustrative outcomes under existing and proposed law

Assumption: No tax return was lodged where a gain on an exit transaction was disregarded under Division 855 or through treaty protection.

<table>
<tr><th>Time of disposal</th><th>Type of asset</th><th>Tax treaty available?</th><th>Outcome under existing law</th><th>Likely outcome under proposed law</th></tr>
<tr><td rowspan="4">After 12 December 2006 and before commencement date for prospective changes</td><td rowspan="2">Fixed to land but not a fixture (e.g., solar, wind, battery energy storage systems (BESS), gas, mining assets)</td><td>Yes</td><td rowspan="4">Not taxable</td><td>Potentially not taxable due to availability of treaty protection</td></tr>
<tr><td>No</td><td>Taxable at 30%</td></tr>
<tr><td>Items falling within the following categories:
Licence or contractual right exercisable over or in relation to land;
Any interest in or right over land;
A lease of a thing; or
A licence or contractual right exercisable over a thing
(Expanded definition assets) that didn't fall within the prior definition</td><td>Yes</td><td>Not taxable</td></tr>
<tr><td>No</td><td>Not taxable</td></tr>
<tr><td rowspan="3">After commencement</td><td>Fixed to land but not a fixture—non-renewables</td><td rowspan="3">Treaty asserts that tax treaties will not provide protection in these circumstances</td><td rowspan="3">Not taxable</td><td>Taxable at 30%</td></tr>
<tr><td>Fixed to land but not a fixture—renewables</td><td>Taxable at 15% (if conditions met), otherwise 30%</td></tr>
<tr><td>Expanded definition assets (assets that did not fall within the prior definition)</td><td>Taxable at 30%</td></tr>
</table>

As highlighted above, these changes may significantly affect historical, current, and future transactions by foreign investors into Australia and if they proceed as drafted, are likely to reduce Australia's attractiveness as a destination for foreign investment.

How did we get here?

As a general position, a capital gain made by a non-resident is disregarded except where the relevant asset is "taxable Australian property" which includes: (i) **TARP**; and (ii) certain shares and other interests in entities that own TARP, referred to as indirect Australian real property interests (**IARPI**).

The term "real property" was previously undefined for income tax purposes and the tax law relied on its ordinary meaning. Its meaning has been subject to some uncertainty, both in respect of its scope under general law principles and with the overlaying of state and territory property laws.
In assessing the exposure draft, it is important to consider its development alongside government policy announcements over the period and recent judicial decisions on Division 855:

- **Initial announcement (May 2024):** In the 2024–25 Budget, the government announced its intention to:
    - Clarify and broaden the foreign resident CGT tax base;
    - Capture direct and indirect disposals of assets with a close economic connection to Australian land and natural resources;
    - Replace the point-in-time principal asset test with a 365-day look-back period; and
    - Require notification to the Australian Taxation Office (ATO) for disposals of shares or membership interests exceeding AUD 20 million.

  The changes were stated to align with broader OECD principles and achieve greater alignment between residents and non-residents, to apply to CGT events on or after 1 July 2025.
- **Treasury consultation (July 2024):** Treasury sought stakeholder feedback on the principles underpinning these changes, again suggesting application as from 1 July 2025.
- **Delayed application (May 2025):** As part of the 2025–26 Federal Budget, the commencement date was deferred to the later of:
    - 1 October 2025; or
    - The first 1 January, 1 April, 1 July, or 1 October after Royal Assent.
- **Key taxpayer wins (late 2025):** In *YTL Power Investments Limited v. Commissioner of Taxation* and *Newmont Canada FN Holdings ULC v. Commissioner of Taxation (No 2)*, the taxpayers were successful on key Division 855 issues and the Federal Court held that real property in Division 855 takes its general law meaning.

Despite there previously being no indication of retrospective operation of the reforms, the exposure draft released in April 2026 introduces significant retrospective amendments.

Impact on historical transactions

Prior to release of the exposure draft, retrospective amendments had not been foreshadowed. Indeed, many submissions had called for "grandfathering" of existing investments in light of investors having relied on the existing regime in making investment decisions.

The exposure draft nevertheless proposes retrospective amendments to the definition of TARP as from December 2006 to include:

- Any interest in or right over land in Australia, regardless of state or territory law;
- Things (or a combination of things) fixed to land for the majority of their useful life, whether or not fixtures; and
- Leases of those things.

The stated justification is that such assets were "always intended" to be captured by Division 855, notwithstanding:

- Key decisions including YTL and Newmont, as noted above, concluding that regard must be had to the general meaning of real property (decisions which the explanatory memorandum acknowledges as identifying a "gap" between the actual and intended operation of the law); and
- Historical ATO guidance acknowledging the potential for fixed assets to fall outside this definition, including private binding rulings (e.g., 1012939775381 and 1012811534095) where the commissioner of taxation ("commissioner") held that significant wind farm assets were not TARP because the property law doctrine of fixtures was relevant to characterisation of assets under Division 855).

These changes are particularly relevant to historical disposals of shares or units in entities holding significant installed infrastructure, where no Australian tax return was required to be lodged at the time and there is therefore no limited amendment period for the commissioner. As outlined below, some protection may be available against retrospective law change for investors from treaty jurisdictions.

Interaction with Australia's tax treaties

Notwithstanding the express intent to align Australia's definition of real property with principles outlined in the OECD model tax treaty, the exposure draft also amends the International Tax Agreements Act 1953 (Cth) to provide that, where a treaty refers to "real property" or "immovable property" by reference to Australian law, that term means TARP as defined in the ITAA 1997.

Importantly, this treaty modification is prospective only, which suggests some acknowledgement that the amendments expand (rather than merely clarify) Australia's tax base. Accordingly, treaty protection may remain available for historical disposals, depending on treaty terms and facts.

Asset classes affected going forward

On a prospective basis, real property for Division 855 purposes will include:

- Any interest in or right over land, regardless of how that interest or right is treated for the purposes of any state law or territory law;
- A personal right to call for or be granted any interest in or right over land;
- A licence or contractual right exercisable over or in relation to land;
- A thing (or combination of things) that is fixed or installed on land and is, or is reasonably expected to be, situated on that (or any other) land for the majority of its useful life (whether or not it is a fixture, or treated in any other way, for the purposes of any state law or territory law or at general law); and
- A lease, licence, or contractual right exercisable over a thing mentioned above.

The table below highlights the key asset classes affected:

Asset class	Effect
• Data centre server access agreements; • Fixed mining infrastructure; • Gas infrastructure with rights under legislation; • Utilities infrastructure; • Transmission lines; • Substations; • Wind turbines; • Solar panels; • Large-scale battery energy storage systems; and • Heavy machinery installed on land	Specifically addressed in the explanatory memorandum as falling within the TARP definition, subject to limited renewable energy concessions
Alternative real estate assets (e.g., self-storage, student accommodation) where customers have licences rather than leases	Customer contracts treated as TARP, regardless of lease/license characterisation
Public-private partnerships and concession arrangements	It will be necessary to consider whether key project documents constitute a license or contractual right exercisable over or in relation to land or fixed assets Economic interests with no associated license or contractual right over land are outside the scope of the amendments

Renewable energy asset concessions

The concessions are stated to be "designed to operate for a transitional period to assist foreign investors in renewable energy assets to price CGT into their investment models."

Instead, the changes:

- Do not provide any relief for taxpayers who exited assets either prior to the date of the initial 2024 announcement or, even more problematically, those that exited between the date of the announcement and the previously announced application date for the new rules (being the later of 1 October 2025 and the start of the next quarter after they receive Royal Assent);
- Do not provide any relief for taxpayers who hold their assets under an Australian holding company (even where they are ultimately a foreign investor), which some taxpayers started doing for new projects in response to the initial 2024 announcement; and
- Will provide a 50% CGT discount (generally from 30% to 15%) only for assets that are disposed of on capital account by 30 June 2030. This will likely only capture existing assets that have been held as long-term investments or, alternatively, assets in development or that are acquired in the future that are then sold on an unexpected and earlier basis.

The mechanics of the changes are that a 50% CGT discount is available to non-individual foreign resident investors (e.g., corporates, trustees of foreign trusts) where:

- The asset is either an Australian renewable energy asset, being an asset that has the primary purpose of generating, or directly facilitating the generation of, electricity in Australia using an eligible renewable energy source (within the meaning of the Renewable Energy (Electricity) Act 2000 (Cth)); or
- A membership interest (i.e., shares or units) where 90% or more of the TARP assets held by the underlying entity are renewable energy assets.

This definition should capture common renewable energy assets such as solar and wind. For **BESS**, the explanatory memorandum suggests that they need to be "essential for the generation of renewable electricity" to meet this test, and that this criterion would be met for a grid-firming BESS system. This will likely be a matter requiring some consideration for standalone batteries but may be more easily supported where the battery has capacity committed to the network or has benefited from state or federal grants and other programs.

PAT—365-day look-back

Broadly, the principal asset test (PAT) is satisfied if the sum of the market value of the TARP assets held by the entity in which the foreign resident has a membership interest exceeds the sum of the market value of its assets that are not TARP. In other words, more than 50% of the value of the entity's assets must be attributable to TARP for a membership interest in that entity to be an IARPI.

The PAT in the IARPI definition currently operates at a point in time (the time of the CGT event). The exposure draft extends the test to also require a look-back testing over the preceding 365 days.

While the point-in-time testing changes apply prospectively, because they have a 365-day look-back, they will in effect take into account the pre-commencement date period once enacted. Under the amendments, the PAT will be met where the underlying entity derives more than 50% of its market value from TARP at any time during the 365 days preceding the CGT event.

As expressed in submissions to the July 2024 consultation paper, the main concern with these changes is the cost and compliance burden attached to demonstrating that the PAT is not met in cases involving material TARP and non-TARP assets. Deloitte Australia expects that once again submissions will suggest that the policy intent of this integrity measure, being to reduce "the ability of entities to manipulate the asset composition of the interest in anticipation of a sale to avoid passing the PAT at the point of sale," could be met with a more manageable look-back across certain key dates (e.g., quarter ends) rather than a continuous test.

A further change introduced by the exposure draft is the inclusion of the value of mining, quarrying, or prospecting information (**MQPI**) when calculating the market value of TARP assets for the purposes of applying the PAT. This is despite MQPI not technically being TARP and is on the basis that it is integral to the market value of mining, quarrying, and prospecting rights (which are TARP) and other associated assets.

Notification requirements

Under existing law, non-resident vendors can provide a declaration that an interest is not an IARPI which eliminates the obligation on the purchaser to withhold from the purchase price on account of non-resident CGT withholding.

The exposure draft proposes that, for transactions with an aggregate value of AUD 50 million or more, the ATO must also be notified. A purchaser cannot rely on the declaration unless notification has occurred, with a failure to do so meaning that the purchaser would be required to withhold 15% of the purchase price and remit these funds direct to the Commissioner.

Notification timing depends on the transaction timetable, as:

- Where the signing-to-completion period exceeds 31 days, notification must be made at least 28 days before the end of that period; or
- Where the signing-to-completion period is 31 days or less, notification must be made before, or as soon as reasonably practicable after signing, and before completion.

In practice, this may restrict simultaneous signing and completion and materially affect deal timetables or alternatively will result in more purchasers choosing to withhold tax.

The draft legislation also proposes a higher onus on purchasers to objectively test whether a vendor's declaration could reasonably be concluded to be false. Going forward, purchasers would need to more actively consider ordinary due diligence results and readily available information, with the explanatory memorandum stating that it is expected that purchasers would undertake and document proportionate, customary checks (such as reviewing Australian Securities and Investments Commission and Australian Business Register extracts, transaction documents, and any residency disclosures), address obvious inconsistencies through routine queries, and retain records.

Next steps

In light of the proposed changes, past, current, and prospective foreign investors would be prudent to review their investment strategies, tax profiles, and any future transaction timelines. Prospective vendors and purchasers should also review their due diligence processes given the proposed new compliance obligations for deals over AUD 50 million.

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