

Tax Alert

Draft law: Proposals to broaden Australia's foreign resident CGT regime, with transitional CGT concession for renewables

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At a glance

Draft legislation proposes significant changes to Australia's foreign resident capital gains tax (CGT) regime to:

- Clarify and broaden the definition of taxable Australian real property (TARP)
- Modify the principal asset test for indirect interests
- Introduce enhanced notification and withholding integrity measures.

Some proposals will apply retrospectively from 2006.

Further draft legislation would introduce a targeted, time-limited 50% CGT concession for gains on eligible foreign investments in Australian renewable energy projects.

On 10 April 2026, the Australian Treasury released two exposure draft (ED) Bills and explanatory memorandums (EMs) for public consultation, to implement measures announced in the 2024–25 Federal Budget which clarify and broaden Australia's capital gains tax (CGT) rules for foreign investors. The proposed measures have both prospective and retrospective effect.

The ED for the 2024-25 Budget measure, *Treasury Laws Amendment Bill 2026: Strengthening the foreign resident CGT Regime*, would amend the foreign resident CGT framework in Division 855 of the Income Tax Assessment Act 1997 (ITAA 1997), to clarify and broaden the types of CGT assets falling within "taxable Australian real property" (TARP) and to amend the point in time principal asset test (PAT) for taxing indirect Australia real property interests (IARPI). It will also limit purchaser's ability to rely on vendor declarations and impose new vendor notification requirements for certain large CGT asset disposals. The ED follows a Treasury discussion paper issued in July 2024.

The proposed measures are a material change to the foreign resident CGT regime. They would commence on the first of 1 January, 1 April, 1 July or 1 October after Royal Assent, with a modified expansion of TARP proposed to apply to CGT events occurring on or after 12 December 2006.

The proposed retrospective amendments, clarifying TARP's scope since Division 855 began in 2006, may significantly affect foreign investors. These reforms could require extensive reviews of previous positions, administrative decisions and compliance. Although meant to resolve ambiguities, the retrospective approach raises concerns about reassessment of completed transactions, investor certainty and unintended tax consequences.

The second ED, *Treasury Laws Amendment Bill 2026: Renewable energy asset discount capital gains for foreign residents*, is a new measure which would introduce a time-limited targeted 50% CGT discount for gains from eligible foreign investments in Australian renewable energy projects. This is a transitional measure available from commencement of the new law, from the first of 1 January, 1 April, 1 July or 1 October after Royal Assent, until 30 June 2030.

The consultation period for both ED Bills closes on 24 April 2026.

Stakeholders, including foreign investors, infrastructure and energy sector participants, and custodians, managed funds and other investment intermediaries, should thoroughly review the EDs. They should assess how the new rules may impact both future and historical transactions and consider making submissions to Treasury to raise questions, seek clarification, or address any concerns about unintended consequences or compliance requirements.

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Executive summary

Strengthening the foreign resident CGT regime

Foreign residents are taxed on capital gains arising from CGT events related to taxable Australian property. Capital gains and losses from CGT events that happen in relation to a CGT asset that is not taxable Australian property are disregarded for tax purposes. Taxable Australian property includes CGT assets that are TARP and IARPI. The amendments clarify and broaden these two related categories of taxable Australian property.

If passed, these proposals could affect tax outcomes for a broad range of investments, especially in infrastructure, resources, and renewable energy but also may inadvertently include a range of other sectors where items are clearly removable from land (and may constitute chattels for stamp duty purposes) but nonetheless installed on land. It may require updates to structures, valuations, and documentation for compliance.

The ED Bill changes include:

- Expansion of the scope of TARP for CGT: including introducing a broad statutory definition of “real property” to cover assets closely connected to Australian land or natural resources.
- Tighter rules on indirect interests: The ED would broaden tax rules for IARPIs, applying the PAT if an entity was land-rich at any time in the previous 12 months. Mining, quarrying, and prospecting information (MQPI) would be included when assessing land asset value for the rules.
- Enhanced compliance measures: Foreign vendors selling large land-rich interests (≥A\$50 million) will need to notify the Australian Taxation Office (ATO) before declaring an interest as non-taxable to avoid foreign resident CGT withholding at 15%. Purchasers can only rely on such declarations if notification occurs within set timeframes. New objective standard will require purchasers to withhold if it is reasonable to conclude a vendor’s declaration is false.

The Division 855 reforms would commence on the first of 1 January, 1 April, 1 July or 1 October after Royal Assent.

However certain key new “real property” definitions are proposed to apply to CGT events occurring on or after 12 December 2006. The retrospective operation is narrower than the prospective rules.

The draft does not include any transitional rules or safe-harbours for existing investments, so pre-existing assets may face different Australian tax outcomes upon sale than expected.

Transitional renewable energy concession

The second ED introduces a 50% CGT discount for foreign resident investors on gains from eligible Australian renewable energy assets until 30 June 2030, intended to help investors adjust to the new rules. Assets must be TARP mainly used for generating renewable electricity, and shares or units qualify if at least 90% of the entity’s TARP assets relate to Australian renewable energy assets.

Clarifying and broadening the scope of taxable Australian real property

TARP changes

The ED would broaden the scope of assets treated as TARP, by introducing a statutory definition of “real property” in the income tax law (see below) and by specifying categories of assets to be treated as TARP.

TARP continues to include mining, quarrying and prospecting rights and will now also include:

- Real property that:
 - i. is situated in Australia; or
 - ii. relates to land situated in Australia; or
 - iii. relates to a thing (or combination of things) fixed or installed on land situated in Australia; or
- Water entitlements in relation to a water resource situated in Australia; or
- An option or right to acquire another CGT asset that is TARP.

Real property definition

The ED inserts a comprehensive definition of “real property” into the ITAA 1997, which is currently undefined and takes its ordinary meaning.

The defined term will still carry its ordinary meaning plus specific inclusions to ensure broad coverage. Notably, state “statutory severance” provisions (which deem certain assets not to be fixtures) are explicitly disregarded when determining what is real property for tax purposes. The changes apply the definition of real property across other tax law provisions which refer to real property.

Key features are:

- Interests and rights in Australian land (definition paragraph (a)): Any interest in or right over Australian land is real property for CGT, regardless of how that interest or right is treated for the purposes of any State law or Territory law.
 - This covers not only freehold and leasehold estates but all forms of legal or equitable interests (e.g. easements, covenants, profits-à-prendre, constructive trusts).
 - The disregarding of State or Territory laws responds to issues highlighted by recent court decisions where State and Territory law concepts (including statutory severance) may produce outcomes that narrow the operation of the foreign resident CGT rules.
 - The definition also expressly includes personal contractual rights to acquire land – such as call options or contractual purchase agreements as real property (paragraph (b)).
- Licences and rights over or concerning land (paragraph (c)): The definition extends real property to any licence or contractual right “exercisable over or in relation to land”. This goes beyond the GST concept of a “licence to occupy” and includes rights to exploit or use land/resources – for example, forestry, agricultural, and water licences are explicitly cited as being within the scope of real property for tax purposes. The policy aims to capture arrangements that grant economic benefits from land without conferring ownership.

- The EM clarifies that incidental entry rights, such as a service contractor's access licence, are not real property, prioritizing substance over form and focusing on substantial land-related rights. However, this seems inconsistent with example 1.1, where an IT services company's right to access a data centre for its servers is treated as real property under paragraph (c).
- Assets ("a thing or a combination of things") fixed or installed on Australian land for the majority of their useful life are treated as real property (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). This would make large infrastructure or equipment taxable as TARP when sold (paragraph (d)). "Installed" means placed for use, including assets that aren't permanently attached but intended to remain long-term. Temporary placement does not qualify. If any part of an integrated system is fixed or installed, the whole installation is considered land-related property. Leasing rights over such assets are taxed the same as ownership (paragraph (e)).
- Licences and contractual rights: The proposed definition also includes "a licence or contractual right exercisable over a thing mentioned in paragraph (d)" (concerning assets fixed or installed on Australian land) (paragraph (f)), which creates significant uncertainty for example as to whether power purchase agreements, offtake agreements, licences and project delivery agreements could themselves be treated as TARP, with potentially far-reaching valuation consequences for both direct asset sales and the application of the PAT to upstream interests.

Transitional rule

The draft law applies certain new "real property" definitions retrospectively to CGT disposals since Division 855 commenced in 2006.

This retrospective application is presented as clarifying the law's original intent that interests in land and major fixtures have always been considered TARP for foreign CGT purposes and is intended to ensure that assets connected to land cannot be treated as non-taxable solely due to technical State or Territory law classifications.

Only genuinely new provisions, like assets merely "installed" on land, will apply prospectively. The retrospective scope remains limited to what is typically understood as real property, ignoring State or Territory labels.

Despite these caveats, the retroactive element is broad: any qualifying past transaction from December 2006 onward could be subject to reassessment under the clarified definitions, potentially imposing CGT on deals that were previously treated as non-taxable. The ATO's ability to enforce back taxes on historic transactions may depend on whether the taxpayer lodged Australian returns (which would start the usual amendment periods running).

Indirect interests in Australian real property (IARPI) – tightened tests

A foreign resident's capital gain on disposing of shares or units can be taxable in Australia if the entity is "land-rich" and the investor holds a non-portfolio interest (generally 10% or more) – these are called indirect Australian real property interests (IARPI).

The ED strengthens two key aspects of this rule:

- PAT extended to 12 months: The PAT will now consider asset composition at any point in the 365 days before sale, not just at the time of sale. If Australian land or resources exceed 50% of assets during that period, foreign sellers with stakes of 10% or more are taxable. This aligns with international practice and is intended to prevent temporary asset changes being made to avoid CGT.
- Mining information included in valuations: The proposals introduce a new rule that when applying the PAT, an entity's TARP assets valuation must factor in any mining, quarrying, or prospecting information (MQPI) linked to mining rights. Although MQPI is not classified as a TARP asset, its value is counted toward the TARP portion for the 50% land-rich test, ensuring mining businesses cannot avoid CGT liability by attributing value to intangible data rather than mining rights.

Foreign investors and their advisors will need to conduct more robust due diligence on target companies' asset histories. Determining if an entity was land-rich at any time in the year prior to sale may require obtaining historical financial statements or valuations. The inclusion of MQPI value means that specialist valuation input will be crucial for deals involving resource companies, to allocate combined asset and data values.

Treaty implications: aligning definitions

The ED will update the International Tax Agreements Act 1953 to clarify that treaty references to real or immovable property use the meaning of TARP in the ITAA 1997.

Strengthened withholding tax regime and ATO notification requirements

Australia's foreign resident non-final CGT withholding tax system requires purchasers to withhold tax (currently 15%) on CGT asset sales by foreign residents, unless appropriate clearance or declarations are provided to the purchaser. The new law bolsters this regime for large indirect asset sales:

- For any transaction (or related transactions) where a foreign investor makes a vendor declaration to a purchaser that their membership interest is non-IARPI, where the aggregated transaction value is A\$50 million or more, the vendor will be required to notify the ATO using the approved form within the review period (from contract to completion).
 - If signing to completion is over 31 days, the ATO must be notified at least 28 days before completion; if 31 days or less, notification is required as soon as possible after signing and by settlement.
 - Failing these steps invalidates the non-IARPI declaration, requiring the purchaser to withhold.
 - The vendor may (and should) also inform the purchaser of the ATO notification and the date the notice was given.
- The ED lowers the standard for when purchasers must withhold tax despite a vendor's declaration. Buyers must now withhold if they know or they could reasonably be expected to know that the declaration is false, rather than the current rule which requires actual knowledge that the declaration is false. This objective test will require buyers to perform and document reasonable inquiries, such as checking corporate records and sale agreements. If evidence suggests a foreign seller's claim of non-taxable status is likely incorrect (e.g., the company is land-rich), the buyer should withhold to avoid liability.

- The existing penalty provisions for false or misleading statements are extended to cover the new ATO notification, thereby placing further penalty risk on the vendor if the statement is incorrect or viewed by the ATO to be incorrect or misleading.

All current exemptions from withholding tax remain in place; notably, sales of assets listed on an approved stock exchange are still exempt from this regime.

These changes will increase compliance costs, with frequent valuations potentially being especially difficult for businesses with changing asset values. The proposed objective purchaser test may lead to stricter due diligence and conservative withholding practices to minimise penalty risk.

50% CGT discount for foreign investors in renewable energy assets

The second ED introduces temporary relief for foreign investors in renewable energy projects, in the form of a 50% CGT discount on qualifying gains,

The measure is intended to encourage continued foreign investment in Australian renewables during the transition to the stricter CGT regime.

The discount is strictly time-bound, applicable to disposals from the commencement of the new law until 30 June 2030 (after which it sunsets).

The discount is available only to foreign residents that are not individuals (e.g. foreign companies, trustee of a foreign trust).

It applies to two types of assets:

- Direct investments: Gains from disposing of an “Australian renewable energy asset” – defined as a CGT asset that is TARP and has the primary purpose of generating (or directly facilitating generation of) electricity in Australia from renewable sources.
 - This covers assets like wind and solar farms, battery storage facilities, etc., including associated land or equipment, provided they are predominantly used for eligible renewable energy production. General transmission or distribution networks that serve broad energy markets are excluded, as they are not directly part of renewable generation. An asset under development can qualify if there is clear evidence of its intended renewable energy use (such as development approvals or grid connection agreements).
- Indirect investments: Gains from selling shares or units which are an IARPI qualify if the sold interest meets a strict “renewable energy asset test,” requiring at least 90% of the entity’s TARP assets to be Australian renewable energy assets at the time of the CGT event. The rule considers multi-tier structures by tracing through entities and includes safeguards against manipulation or last-minute asset changes to meet the threshold.

How EY can help

Our EY tax advisors can:

- Help you analyse these complex new proposals and consider potential impacts on retrospective positions and for current and future investments.
- Update your valuations of direct and indirect assets.
- Assist you with documentation and compliance requirements, including ATO notification requirements.
- Assist with engagement with Treasury.

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