Tel: +61 7 3237 5999
Fax: +61 7 3221 9227
www.bdo.com.au

Level 18, 360 Queen Street
Brisbane QLD 4000
GPO Box 457 Brisbane QLD 4001
Australia

International Tax Unit
Treasury
Langdon Crescent
PARKES ACT 2600

Attention: Marty Robinson

24 April 2026

BDO SUBMISSION - FOREIGN RESIDENT CAPITAL GAINS TAX EXPOSURE DRAFT LEGISLATION

BDO refers to the invitation by Treasury to provide feedback following the recent release of the Exposure Draft *Treasury Laws Amendment Bill 2026: Strengthening the Foreign Resident CGT regime* and *Treasury Laws Amendment Bill 2026: Renewable Energy Asset Discount Capital Gains Tax for Foreign Residents* (**'Exposure Draft legislation'**).

Unless otherwise stated, all references are to the *Income Tax Assessment Act 1936* (**'ITAA 1936'**) and to the *Income Tax Assessment Act 1997* (**'ITAA 1997'**).

Whilst BDO understands the intention of Treasury with these reforms was to provide clarification on aspects of the foreign resident Capital Gains Tax (**'CGT'**) rules in Division 855 of the ITAA 1997 as well as administrative aspects relating to foreign resident CGT withholding tax, significant concerns arise with the Exposure Draft legislation proposed.

Our feedback in relation to the Exposure Draft legislation is set out in the Appendix that follows this letter and may be summarised in the following key points:

1. **Retrospectivity of aspects of the legislation:** to provide certainty to taxpayers and reduce Sovereign risk, legislation should ideally be prospective, or applicable from the date of announcement. The Exposure Draft legislation proposes retrospective legislative amendments going back nearly 20 years to 12 December 2006 when Division 855 was first introduced creating significant uncertainty and tax risk for foreign resident investors. It would be much better policy for those changes to only apply to arrangements entered on or after Royal Assent.
2. **Administrative aspects and statutory limitation on period of review:** in the event retrospectivity is retained the law should contain statutory limitations on the period of review by the Commissioner of Taxation (the **'Commissioner'**) to raise assessments against a foreign resident taxpayer where no tax returns have been lodged on the basis any gain or loss on disposal was disregarded under Division 855 (for example a 2 year look back to CGT events occurring from 14 May 2024).

   Further clarity and assurance is also required for purchasers in a transactional context who have relied on a vendor declaration that the disposal is not an Indirect Australian Real Property Interest (**'IARPI'**).

3. **The broadened definition of "real property" requires further clarification:** in particular the meaning of *"any interest or right over land situated in Australia"* as set out in the proposed paragraph 855-20(a) of the ITAA 1997. The retrospective application of this definition should also be reconsidered and limited. Further, "installed on land" is a new concept in the definition of "real property" in subsection 995-1(1) of the ITAA 1997 which also warrants clarification.

4. **The notification requirements to the Commissioner for transactions over $50 million and higher onus of proof required for purchasers relying on vendor declarations create significant additional red tape and complexity for vendors and purchasers in a transactional context.**

5. **The proposed reforms to change the point in time test under the Principal Asset Test ('PAT') to a 365 day test creates practical challenges for taxpayers.**

   Under the proposed test, a non-portfolio membership interest will be an IARPI if the assets of the entity in which the interest is held derive more than 50% of their market value from Taxable Australian Real Property ('**TARP**') at any time during the 365 days preceding the CGT event. There is reference in the EM to this change being required to address integrity risks posed by the current point in time test. It is noted that there is already an integrity measure in the foreign resident CGT rules to address such concerns (refer subsection 855-30(5) and section 855-32 of the ITAA 1997). The need for an additional integrity-based measure should be clear and weighed up against the significant practical challenges and effort it will place on taxpayers to satisfy the requirement.

6. **The renewable energy 50% CGT discount for eligible foreign residents disposing of Australian renewable energy assets** directly, or for certain qualifying IARPI applicable to CGT events occurring from commencement until 30 June 2030 is subject to satisfaction of a renewable assets test. Whilst this measure is welcome, it requires 90% or more of the value of an entity's TARP assets to be attributable to Australian renewable energy assets which is a very high threshold test and should be revisited. A 4 year sunset date is also insufficient given the investment horizon of the renewables sector.

7. **Need for further guidance:** We submit that the changes should be subject to adequate stakeholder consultation prior to enactment and commencement. This may mean extending the consultation process or having a second round of consultation following any revisions to the current Exposure Draft legislation.

Should you have any questions or wish to discuss any of the comments made in our submission, please do not hesitate to contact me on (07) 3173 5581 or via email (sharnie.mitchell@bdo.com.au).

Yours sincerely

BDO Services Pty Ltd

Sharnie Mitchell
Partner

Appendix:

Strengthening the Foreign Resident CGT rules

The introduction of changes to the foreign resident CGT rules was broadly foreshadowed in the 2024-2025 Federal Budget handed down on 14 May 2024. Since that time there has been no public consultation conducted prior to the Exposure Draft legislation.

The proposed amendments represent significant changes to the existing rules and require further consideration.

We welcome the desire to provide greater clarity in the income tax law for taxpayers, particularly given the recent case law on the application of the foreign resident CGT rules, and indeed other cases which are still to be heard or finalised. However, we have many concerns with the proposed changes discussed in further detail below.

1. Retrospectivity of aspects of the legislation

The retrospective legislative amendments going back to 12 December 2006 relating to the definition of "real property" create significant uncertainty and tax risk for foreign resident investors with respect to historical and existing investments, whilst the reputational risk to Australia by imposing retrospective taxation outcomes in terms of securing future foreign investment in a globally competitive environment remains regrettably unquantified.

Changes to Australia's foreign resident CGT regime were first announced on 14 May 2024 as part of the 2024-2025 Federal Budget and were originally to apply to CGT events occurring on or after 1 July 2025.

Subsequently, in the 2025 Federal Budget, the start date of these measures was deferred to the later of 1 October 2025 or the start of the first quarter after the Act received Royal Assent (i.e. 1 January, 1 April, 1 October).

Following the release of the Exposure Draft legislation, we note the ATO has published clarifying guidance[1] on its proposed administrative approach with respect to the application of the Exposure Draft legislation stating:

> *The draft law confirms, with retrospective effect, the ATO's long-standing view and compliance approach that the term 'real property' is not limited to its narrow, technical legal meaning. This aligns with how we have administered the law. If the law is enacted, we would not expect to change our existing administrative approach.*
>
> *In practice, we would continue our current compliance approach for disposals that:*
>
> - *are currently subject to review*
> - *have occurred in the past 4 years.*
>
> *Generally, we do not conduct reviews on disposals older than 4 years, even if the period of review is still theoretically open. However, if an older case came to our notice for other*

[1] https://www.ato.gov.au/about-ato/new-legislation/in-detail/businesses/strengthening-the-foreign-resident-cgt-regime

reasons, we may review it. For example, if a taxpayer applied for a ruling that involved the amended law, we would consider any retrospective effects.

Similarly, we won't seek to re-open settlements that the parties intended to be final, except in very rare exceptions.

Therefore, we don't expect the retrospective changes to the law, if they're enacted, to affect many taxpayers. The changes will mainly clarify the law for those taxpayers already subject to review or who would normally be subject to review.

Whilst the ATO guidance is timely, it does not provide taxpayers with any certainty as to prior year tax exposures when a 20 year lookback period is legislated. Relevantly, taxpayers have relied on existing law as well as publicly available ATO interpretative guidance in applying Division 855 of the ITAA 1997. [JM1.1][JM1.2][SM1.3]

The Treasury should note that after significant period of nearly 20 years since the Division 855 was enacted, the Commissioner has not sought nor issued public binding guidance or practical compliance guidance on its interpretative views on taxable Australia property, such views only becoming publicly known when they were not accepted by recent Federal Court decisions[2].

We submit further that to enact these rules with retrospective effect is inconsistent with the rule of common law presumption against retrospective operation, a presumption which it is submitted should only be departed from in the context of Tax legislation in order to restore the position to a prior understanding and/or to address widespread avoidance.

In that regard, neither of these circumstances appear to exist given the aforementioned Federal Court cases indicate differing views as to interpretation of the law as currently enacted as compared with the administrator, and further there is no widespread evidence of avoidance, as conceded by the ATO in their guidance mentioned above.

On that basis and given the uncertainty that retrospective application creates for taxpayers with respect to historic transactions (vendors and purchasers alike), we submit that appropriate tax policy should be for these changes to only apply to arrangements entered into on or after Royal Assent.

Where retrospectivity is retained, it should be limited to statutory severance issues and limited to the date of announcement of these changes (i.e. a 2 year lookback period to the date of announcement on 14 May 2024).

2. Administrative aspects and statutory limitation on period of review

In the event retrospectivity is retained the law should contain statutory limitations on the period of review by the Commissioner to raise assessments against a foreign resident taxpayer where no tax returns have been lodged on the basis any gain or loss on disposal was disregarded under Division 855. This is preferable to relying on ATO website guidance. For example a 2 year review period to CGT events occurring on and from 14 May 2024.

[2] *Newmont Canada FN Holdings ULC v Federal Commissioner of Taxation (No 2)* [2025] FCA 1356; YTL Power Investments Ltd v Federal Commissioner of Taxation [2025] FCA 1317

Further clarity and assurance is also required for purchasers in a transactional context who have previously relied on a vendor declaration that the disposal is not an IARPI by way of a statutory mechanism in the enabling legislation which provides that purchasers who have relied on those declarations will not be required to withheld, even though under the retrospective application of the proposed legislation may change the IARPI analysis such the declaration made by the Vendor is not correct.

3. The proposed broadening of the definition of "real property" requires further clarification

Why there is a need to significantly broaden (as opposed to clarify) the application of the rules through the specific inclusion of "any interest in or right over land" or a "licence or contractual right…in relation to land" as "real property" should be clearly articulated. Casting such a wide net will serve to cast further doubt on the (additional) assets which fall in scope and will lead to assets potentially being captured not in alignment with the policy intent of the changes. For example, would rights under a power purchase agreement now constitute "real property"?

Treaty protection

Treasury Laws Amendment Bill 2026: Strengthening the foreign resident CGT regime seeks to redefine the term "real property" or "immovable property" under Australia's double tax treaties, via an amendment to the *International Tax Agreements Act 1953*. It is done by reference to the proposed changes to "real property" under section 995-1(1).

The amendment to Australia's double tax treaties in this manner gives rise to significant concerns. In particular:

- Australia would be making a unilateral change to its double tax treaties. Whilst Australia has adopted this approach for preserving the application of specific anti-avoidance measures in a treaty context (e.g. Part IVA, DPT), we submit that it should not ordinarily be followed for domestic tax law changes as a means of by-passing the bilateral treaty negotiation process.
- Australia did this over 20 years ago in response to the *Lamesa Holdings* case. If followed again, it would create uncertainty in application for taxpayers and Australia's treaty partners (e.g. with respect to the Alienation of Property article), particularly with respect to an asset which is currently not considered to be real property (e.g. a chattel), or shares whose value is not principally attributable to Australian real property (based on current meaning), and therefore taxable in the foreign jurisdiction.
- Further, such an approach would call into question whether treaty protection is legitimately available where the sale of assets from historic transactions fall within the retrospective changes.
- Other than the single proposed change to subsection 3(5) of the *International Tax Agreements Act 1953*, there is no clear interpretation on these issues, or indeed any potential interaction with the *Multilateral Instrument* (**MLI**), on current reading of the exposure draft bill or explanatory memorandum.
- Consequently, differences in interpretation between treaty partners could lead to double tax outcomes for taxpayers.

- Reflecting more broadly, the proposed change to the definition of "real property" for income tax purposes and then treaty purposes, could have implications for other arrangements involving real property, not just disposals of CGT assets by foreign investors. For example, Australia's taxing rights under the Income from Real Property article (typically Article 6 in Australia's double tax treaties) turn on the definition of "real property". These impacts go beyond the stated policy intention of the proposed changes to strengthen the foreign resident CGT regime.
- Sovereign risk for foreign investors that structured their investments in compliance with the laws at the time – due to the potential retrospective application, now face the risk that chattel assets could be treated as fixtures for CGT purposes.

4. The notification requirements to the Commissioner for transactions over $50 million and higher onus of proof required for purchasers relying on vendor declarations create significant additional red tape and complexity for vendors and purchasers in a transactional context

Under the Exposure Draft legislation, changes to the foreign resident CGT withholding regime are proposed. Specifically, for disposals of non-IARPI membership interests with an aggregated value of A$50 million or more (including related transactions), foreign resident vendors must notify the Commissioner within a prescribed period when making a non-IARPI vendor declaration to a purchaser.

We make three observations in relation to the time limits for notification to the Commissioner, uncertainty as to the related transactions aggregated $50 million threshold and in relation to the knowledge requirements for purchasers relying on such declarations.

4.1. Time limits for notification to the Commissioner

The non-IAPRI vendor declaration for such transactions is invalid if the notification to the Commissioner is not made within the transaction's 'review period' which begins from when the transaction is entered into and ends immediately before the purchaser becomes the owner of the CGT asset.

We note the EM to the *Treasury Laws Amendment Bill 2026: Strengthening the Foreign Resident CGT regime* specifies the review period begins from the date when the 'contract is entered into' (i.e. a legally binding contract) which is clearer than the wording in the Exposure Draft legislation which refers to the date when the transaction is entered into.

- Where the review period is more than 31 days – the vendor must give the Commissioner the non-IARPI vendor declaration at least 28 days before the end of the review period.
- Where the review period is 31 days or less, the vendor must give the Commissioner the non-IARPI vendor declaration as soon as reasonably practicable after the review period begins and in any case before the review period ends.

Whilst understanding the rationale for these changes, they do impose significant compliance burdens on vendors and purchasers and the time limits should be simplified as it may not be clear at the time of contract execution how long the review period will be and could result in commercial transactions being delayed in order to allow the requisite time for lodgement of a non-IARPI vendor declaration.

4.2. Uncertainty as to related transactions aggregated $50 million threshold

It is also unclear how the "Related transactions" aggregated $50 million threshold applies as it is not defined and should be limited for example to related party transactions or transactions forming substantially one contractual arrangement.

4.3. Additional due diligence requirements for purchasers

Further, the proposed amendments will give rise to significant additional due diligence requirements for purchasers as the knowledge threshold required to determine if the disposal is non-IARPI is lowered.

Under the current rules, where a valid non-IARPI declaration is provided, there is no obligation for the purchaser to withhold and a declaration may be relied on unless the purchaser knows subjectively the declaration is false.

Under the proposed changes, purchasers must apply an objective test as to whether they could reasonably be expected to know that a vendor declaration is false rather than relying on the vendor's statement.

This gives rise to a much higher onus of proof on purchasers to conduct due diligence in respect of a non-IARPI declaration rather than relying exclusively on a vendor declaration as is currently the case.

The proposed changes fail to reflect the commercial reality that there is not necessarily symmetry of information as between a vendor and a purchaser, and therefore an objective determination by a purchaser based on limited and otherwise confidential information provided by a vendor which may result in a different objective outcome, to that of a party appraising the position with the benefit of the vendor's information. A qualification on what information the Purchaser is reasonably expected to know in order provided in the Regulations in order to have been able to make an objective assessment should be implemented in order to enhance certainty and effective compliance.

5. **The proposed reforms to change the point in time test under the Principal Asset Test ('PAT') to a 365 day test creates practical challenges for taxpayers**

The proposed 365-day test period under the PAT as compared to the current point in time test is purportedly required to deal with "an integrity risk" whereby "foreign residents could seek to avoid Australian CGT by altering the composition of an entity's assets immediately before the CGT event, so that the PAT is not satisfied at the time of the CGT event."

We submit that this risk has already been adequately addressed through previous legislative intervention via the insertion of subsection 855-30(5) of the ITAA 1997. The EM to the *Tax Laws Amendment (2006 Measures No. 4) Bill 2006* specifically stated that this was the reason for the inclusion of the integrity rule in subsection 855-30(5) (at paragraph 4.63):

> "*An integrity rule ensures that the value of assets acquired for a purpose (other than an incidental purpose) that includes ensuring that the principal asset test would not be passed are to be disregarded for the purposes of the principal asset calculation.*"

Further (at paragraph 4.84):

> *"An integrity measure has been included to ensure that the assets of the entities being tested are not inappropriately inflated by the injection of liquid assets at the testing time. In*

working out whether the value of the interest being tested is derived from taxable Australian real property, the market value of any asset acquired by an entity is disregarded if the acquisition was done for a purpose, other than an incidental purpose, that includes ensuring that the principal asset test was not passed. [Schedule 4, item 2, subsection 855-30(5)]"

Accordingly, it is submitted that an additional integrity measure, which seeks to achieve the same objective, is not required. This is without yet giving any consideration to the significant practical and compliance challenges facing taxpayers trying to establish the market value of TARP and non-TARP assets for a continuous 365-day period to both vendors looking to apply the PAT and purchasers in discharging the heightened onus of proof also placed upon them under the proposed changes.

For completeness, while it may seem obvious and trite, the Commissioner has broad general anti-avoidance measures (under Part IVA of the ITAA 1936) available to be used to address any integrity concerns in relation to a particular transaction.

For taxpayers, the 365-day test will introduce substantial commercial and administrative obstacles. It is submitted that this test is not preferred when balancing the requirements of compliance, valuation complexity and economic impact. Specifically:

- *Continuous monitoring and valuation*: A vendor must effectively monitor the market value of its entire asset base daily to ensure the 50% TARP threshold under the PAT is not breached at any point. This is practically impossible for large, complex, multi-asset projects and entities.
- *Cost of compliance*: Vendors will need to obtain historical valuations covering the entire 365-day look-back period. The record keeping requirements would be very onerous. For private companies or trusts with bespoke assets (like renewable energy infrastructure), the cost of multiple valuation reports is disproportionate to the tax at stake. Further, for large scale and complex, asset intensive investments, the requirement to obtain contemporaneous, well-documented market valuations, potentially via an independent third-party valuer, is likely to be cost-prohibitive, practically impossible and disproportionate to the risks to the revenue base the Government is seeking to protect.
- *Very high bar*: If at *any* time in the preceding 365 days, the market value requirements cannot be satisfied, or proven to be satisfied (noting the ATO's significant expectations when it comes to valuations), it will cause the PAT to be failed for the vendor. The consequence is severe when there may just be ordinary market movements or fluctuations which give rise to changes in the market values of the assets. This is distinct from any manipulation of asset compositions or perceived integrity concerns raised in the EM.

  It will also place an almost impossible threshold for purchasers to meet in discharging their (new) onus of proof under the knowledge condition changes proposed to s. 14-210(3)(b) of the *Taxation Administration Act 1953* ('**TAA 1953**'). In that way, potentially stifling and frustrating ordinary sale transactions or the M&A process.
- *Retrospective records*: Vendors who sold assets in prior years would not have the historical valuation data or records to prove the market value requirements under the PAT. The changes and the EM are silent on how this would need to be addressed.

- *Foreign capital flight risk*: For projects which face fluctuating asset values or assets which now risk falling into the CGT net, for example, because of the prospects of not being able to satisfy the 365-day test requirements, it is possible that foreign investors may choose to withdraw their capital. For industries which the Government is seeking to attract investment into, especially renewable energy, this would be problematic and purported incentives like the 50% CGT renewable energy asset discount for foreign residents are unlikely to mitigate this risk.

We submit that the 365-day test period be removed. If the Government is still concerned and wants more frequent testing, that could still be an option. For example, half yearly testing or even quarterly testing. This issue is important and would require additional considered consultation to balance the risks the Government is seeking to address (once better understood by the public and industry) and the practicalities for taxpayers.

6. The renewable energy 50% CGT discount proposed for eligible foreign residents disposing of Australian renewable energy assets is too narrow and subject to a limited sunset period of approximately 4 years

Under the *Treasury Laws Amendment Bill 2026: Renewable Energy Asset Discount Capital Gains Tax for Foreign Residents* Exposure Draft legislation, a transitional 50 per cent CGT discount is proposed to be introduced for eligible foreign residents (excluding individuals) disposing of Australian renewable energy assets or qualifying indirect interests before 30 June 2030.

Whilst this measure is welcome, there are two key concerns:

1. It requires 90% or more of the value of an entity's TARP assets to be attributable to 'Australian renewable energy assets' which is a very high threshold test and should be revisited. For example, a 50% threshold may be more appropriate.
2. Australia has set a legislated target to reduce its greenhouse gas emissions[3] to net zero by 2050. Australia will need more renewable energy and adequate funding to drive existing and new industries that supports the development of technology that will help Australia decarbonise. Foreign investment plays a crucial role for Australia's prosperity and is a core part of the Government's economic policy and investment strategy. It helps drive economic growth, creates skilled jobs, improves access to overseas markets and improves productivity, competition and innovation. Whilst the transitional 50 per cent discount is a welcome measure, it is important to extend the discount for a longer period to attract foreign investment to assist Australia achieve its legislative target of net zero by 2050. Sunsetting this CGT concession for only 4 years to 30 June 2030 could disincentivise foreign investment and force an early exit.

7. Need for further guidance and consultation

Given the very short timeframe for this consultation and the many matters raised in this submission on the two exposure drafts with respect to the proposed amendments to the foreign resident CGT (and related) rules, we are concerned that the law, if finalised as is, will contain a number of uncertainties which will need to be managed by taxpayers, advisers and the ATO.

[3] https://www.dcceew.gov.au/climate-change/emissions-reduction

Notably, the ATO has already identified one such key uncertainty in relation to the retrospective nature of the changes and publicly issued (non-binding) comments in relation to the ATO's proposed approach to reviews of historic disposals.

We submit that there needs to be greater legislative guidance and clarification provided to address these uncertainties where possible and practicable, such as via the explanatory memorandum. This includes on matters concerning policy intent and by reference to practical examples (e.g. application of the 365-day testing period under the principal asset test and the potential interaction with Australia's double tax treaties).

As a broader, more general, observation about the direction of the various changes to Australia's international tax laws in recent times, we are concerned with the impact the proposed foreign resident CGT changes will have on Australia's attractiveness as a jurisdiction for important foreign investment. The economic and fiscal implications from deterring foreign capital in critical growth and future-ready assets and projects (like infrastructure, natural resources and renewables) could have adverse long-term consequences for the productivity and prosperity of the nation.