Law Council
OF AUSTRALIA

Business Law Section

24 April 2026

The Treasury
Langton Crescent
Parkes ACT 2600

By email: MNETaxIntegrity@treasury.gov.au

Dear Treasury,

Strengthening the foreign resident capital gains tax regime—draft legislation

1. The Taxation Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to comment on the:

   (a) Exposure Draft of the Treasury Laws Amendment Bill 2026: Strengthening the foreign resident CGT regime (**Exposure Draft**); and

   (b) Exposure Draft Explanatory Materials to Strengthening the foreign resident capital gains tax regime—draft legislation (**Explanatory Materials**)

   —together the **Draft Legislation**.

Key Points

2. This submission raises significant rule of law concerns about the Draft Legislation. The Law Council of Australia strongly supports the Committee in bringing these matters to The Treasury's attention and seeks a meeting to discuss them. Compliance with core rule of law principles should never be optional.

3. To this end, the Law Council's Rule of Law Principles Policy Statement (**LCA Policy**) is **attached**. This acts as a guide to the framework often employed by the Law Council and its committees in evaluating the merits of government legislation, policy and practice. We encourage its circulation across Government.

4. The key matters the Committee wishes to comment on are:

   (a) 'rule of law' principles (as noted);
   (b) retrospective application;
   (c) potential for double counting—multiple interest holders;
   (d) potential for double counting—timing issues;
   (e) the term 'or closely related interests';
   (f) breadth of the expanded "real property" definition in relation to things fixed or installed on land;

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(g) double tax agreements;
(h) 365-day Principal Asset Test; and
(i) non-resident CGT withholding.

Submission

5. The Committee makes the following comments on the Draft Legislation.

The Exposure Draft offends 'Rule of Law' principles

6. There can be little doubt that retrospective legislation that creates burdens that did not previously exist, or that takes away rights that did previously exist, offends core rule of law principles which regulate the conduct of Australian society. In 2001 the then Chief Justice of Australia said "*The concept of laws as rules of general application, capable of being known in advance by citizens who may exercise choice, and order their affairs, accordingly, is part of the idea of the rule of law*".[1]

7. In a work they edited, Saunders and LeRoy say: "*At the heart of the rule of law lie three concepts. First, the polity must be governed by general laws that are laid down in advance*".[2] Notably, being laid down in advance is the first of these concepts. This concept is reflected in Principle 1 of the LCA Policy.

8. Similarly, Justice Gordon wrote that:

> *… regularity as opposed to arbitrariness is central to the rule of law: "laws as rules of general application, capable of being known in advance by citizens who may exercise choice, and order their affairs, accordingly". On one view, a retrospective law may offend that central concept and be held to apply irregularly. A taxpayer entering into a transaction does not know how it will be taxed; the criteria are incapable of being known in advance by a citizen who can then exercise a choice and order its affairs accordingly. Why? Because the rules—the retrospective legislation—come after the taxpayer has legitimately ordered its affairs. At the time of ordering its affairs the taxpayer does not know and cannot know that the rules will change and, if so, when and how.*[3]

9. Her Honour also observed that, while "*the overall sovereignty of Parliament permits retrospective legislation*", there may be a difference in legitimacy terms for taxation laws which clarify matters or have short retrospectivity periods on the one hand and impose new burdens, withdraw previous concessions, or have long retrospectivity periods on the other—the latter potentially being a problematic exercise of constitutional taxing powers.[4]

10. The Draft Legislation will have both a long retrospective operative period and, consistent with Hespe J's comments in the *YTL Power Investments* decision,[5] is clearly in the category of imposing new liabilities.

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1 "*Courts and the Rule of Law*" Murray Gleeson, The Rule of Law Series, Melbourne University, 7 November 2001.
2 "*The Rule of Law*" Editors Cheryl Saunders and Katherine Le Roy, Federation Press, 2003, p. 5.
3 "*The Commonwealth's taxing power and its limits—Are we there yet*" 8th Annual Tax Lecture, Melbourne Law School, University of Melbourne, 29 August 2012, p. 15.
4 "*The Commonwealth's taxing power and its limits—Are we there yet*" 8th Annual Tax Lecture, Melbourne Law School, University of Melbourne, 29 August 2012, p. 14.
5 *YTL Power Investments Limited v Commissioner of Taxation* [2025] FCA 1317.

11. The implications that flow from a system that permits, and practices, enactment of materially retrospective legislation and the compromise in the confidence in the system of legal regulation bear serious reflection. The proposal needs to be revisited and changed. While it is open to government to execute its policies and political agenda by making laws with prospective operation, there is a basic and obvious unfairness in allowing the community to order its affairs, potentially distribute property, assets and wealth in reliance on one set of taxation laws and one set of expected taxation burdens, only to have those laws and burdens altered after the event—potentially after assets out of which those burdens would ordinarily be expected to be met if known in the ordinary way (namely in advance) have been disbursed.

12. The Draft Legislation's problematic nature is not ameliorated by reference to emotive slogans such a "paying fair shares" and the like. It is never fair to change rules to impose new burdens after existing rules have been in place for a long period, are known and have been relied on, and community members' arrangements are made in that knowledge and based on that reliance. Similarly, the problematic retrospectivity is not cured by administrative measures that involve selective application, itself a problematic feature of administration of legislation from a rule of law perspective, but a problem beyond the legislation itself.

"Clarification of existing law"

13. There are repeated assertions in the Explanatory Materials that the proposed amendments will clarify the "*policy intention*" that certain assets "*were always intended*" to be within the foreign resident CGT tax base. This is the reason provided for the retrospective effect of the definition of "real property" to when the foreign resident CGT rules were first introduced in 2006. These statements do not appear to be consistent with the following statement in the original Explanatory Memorandum for Division 855 of the of the *Income Tax Assessment Act 1997* (**ITAA 97**) (at 4.1, emphasis added):

> *Schedule 4 to this Bill inserts Division 855 and Subdivision 960-GP into the Income Tax Assessment Act 1997 (ITAA 1997). This Schedule also repeals Division 136 of the ITAA1997 and makes changes to various provisions of the Income Tax Assessment Act 1936 (ITAA 1936).* ***The changes narrow the range of assets on which a foreign resident will be liable to Australian capital gains tax (CGT) to Australian real property and the business assets (other than Australian real property) of a foreign resident's Australian permanent establishment.*** *To complement this change, the integrity of the CGT regime is strengthened by including foreign resident indirect holdings of Australian real property. This ensures that capital gains and capital losses on a foreign resident's indirect, as well as direct, interests in the targeted assets are subject to Australia's CGT regime*

14. In considering the above extract, Hespe J noted in *YTL Power Investments*:

> *[b]y the enactment of Division 855 there was an intentional narrowing of the classes of CGT assets gains on which were to be taxable to foreign residents.*[6]

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6 *YTL Power Investments* at [119]

15. Further, the definition of "real property" in Division 855 was specifically expanded to include "leases of land" in 2009 because leases are not ordinarily considered to be "real property" at common law.

16. The Australian Taxation Office (**ATO**) also subsequently issued a number of Private Rulings in 2015 to 2018 (now withdrawn) that were consistent with a narrower interpretation of the definition of "real property".

17. It is not, therefore, unreasonable for taxpayers to have interpreted the original words of section 855-20 to exclude assets that are not treated as interests in land under either common law or statute and, as such, we submit that the 20 year retrospective effect of the proposed changes is not reasonable.

ATO's announcement

18. We note that the ATO has publicly indicated[7] that it does not "*expect the retrospective changes to the law, if they're enacted, to affect many taxpayers*" on the basis that the ATO "*generally*" would not conduct a review of disposals older than 4 years, and will only seek to reopen settlements "*in very rare exceptions*". We submit that this provides little comfort for taxpayers.

19. Further, the ATO has stated that *"[t]he changes will mainly clarify the law for those taxpayers already subject to review or who would normally be subject to review*". We take this to mean, among other things, that taxpayers who have invested significant resources in successful Court proceedings will now be informed that those Court proceedings are of no relevance due to the retrospective changes in law. In other words, recent decisions of the Federal Court would be effectively overridden by the legislature. This is precisely the type of exercise of taxing powers referred to above that will compromise confidence in the tax regulatory system.

20. Apart from the inadequate solution of taxpayers relying upon non-binding, qualified statements by the ATO in the context of the opportunity to draft clear legislation, there is a lack of fairness inherent in the ATO approach in that taxpayers in relation to which the ATO has commenced action, and those for which the review period has not yet expired, would be subject to the new rules, while taxpayers for whom the review period has expired will not. In other words, to some extent, the ATO's decisions as to which taxpayers to review would dictate who is affected by the retrospective amendments.

21. For the reasons outlined above, the new law should apply prospectively only.

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[7] Strengthening the foreign resident capital gains tax regime | Australian Taxation Office, accessed on 21 April 2026.

Retrospective application—self assessment, absence of review periods, and practical impossibility of compliance

22. In a self-assessment system, many foreign residents who relied on Division 855 to disregard capital gains will not have lodged Australian income tax returns at all. As a result:

    (a) there is no practical "review period" constraining the Commissioner;

    (b) assessments could be issued decades after the relevant transaction; and

    (c) taxpayers may have long since distributed proceeds, exited Australia, or lost access to records needed to discharge the burden of proof.

23. This raises not only fairness concerns, but also significant administrability issues that are not addressed by the draft legislation, including:

    (a) whether taxpayers whose positions are retrospectively affected are expected to voluntarily disclose and amend historic positions; and

    (b) how taxpayers can meaningfully comply where contemporaneous evidence is unavailable or incomplete.

24. These matters reinforce the rule of law objections articulated above.

Potential for double counting—multiple interest holders

25. The proposed new definition of "real property" does not appropriately address situations when taxpayers have different interests, or deemed interests, in the same area of land or the same thing fixed or installed on land.

26. Where a thing fixed or installed on land or the land itself is subject to a lease or licence, the proposed meaning given to "real property" suggests that multiple taxpayers will have "real property" in relation to the thing fixed or installed. Without additional clarification, this could lead to uncertainty and the risk of double counting the value of the thing. If shares in the taxpayers are sold, there is potential for the same assets to be taken into account in working out whether assessable gains are made by two or more different non-resident investors.

27. By way of example, wind turbines or solar panels owned by an equipment leasing company may be leased to a renewable energy operator which then fixes the turbines or panels on land leased from a primary producer. As the proposed meaning of "real property" includes any interest in the land, the thing, a lease of the thing, as well as any licence or contractual right exercisable over the thing, all three parties would potentially have "real property" in relation to the turbines or panels. This example is very simple, and real-life examples are generally far more complex. For example, in relation to data centres, there are usually a number of different taxpayers with leases and licences which confer different rights in relation to assets and/or land. While is it arguable that a valuer would only include the value of the taxpayer's interest in the thing, that is likely to depend upon the precise rights conferred upon the taxpayers, under the law as well as the specific terms of the agreements, and, potentially, the effect of relevant State severance provisions

(if any). It would be vastly preferrable for the legislation to be drafted clearly to prevent double counting of the same assets, rather than leaving the delineation of the boundaries of the law to valuers and the Courts.

28. We suggest that this uncertainty and risk of double counting could be reduced through alignment of the definition of "real property" with the concept of economic ownership recognised for depreciating assets under the capital allowance rules in Division 40 of the ITAA 97, such that only the economic owner would be recognised as having the "real property". This approach could provide the clear delineation that is necessary to achieve fairness in the operation of these rules by ensuring that the value of the land or equipment in question is not included in more than one taxpayer's "real property".

Potential for double counting—timing issues

29. The change from the single point in time test to the 365 days test for applying the new foreign resident capital gains tax rules also has the potential to give rise to double counting, unless appropriate amendments are made to the draft legislation.

30. A simple example: an Australian resident company has historically held significant land interests, and decides to focus on different areas of its business and sells the land. The company makes assessable capital gains on the sale of the land and reinvests the after-tax cash proceeds in non-land-related business assets. The shareholders in the company enter into an agreement to sell the shares in the company within 365 days of the sale of the land. The non-resident shareholders could be subject to CGT on the sale of the company even though the company has already sold, and paid tax in respect of, its former land assets. Further, the CGT rules would apply to tax all of any capital gain on the investment in the company even though the capital gain attributable to the former landholdings has already been taxed in Australia.

The term 'or closely related interests'

31. The Exposure Draft also contemplates amendments to various object and purpose provisions in Division 855. Specifically, section 855-1, paragraph 855-5(2)(b), and subsection 855-30(1) have been modified to refer to "*real property or closely related interests*". None of these object and purpose provisions have substantive operation. The use of the phrase "*closely related interests*" is inappropriate as it creates confusion for the following reasons:

    (a) It is not clear what kind of interest that is not itself 'real property' would be 'closely related' to real property, which is now broadly defined in an inclusive manner.

    (b) We are concerned that including the words 'or closely related interests' in these provisions is intended to indirectly extend the definition of 'real property' to intangible assets that have a 'close economic connection to Australian land and natural resources'. This, however, is not a natural reading of any of the operative provisions.

Breadth of the expanded "real property" definition in relation to things fixed or installed on land—boundary uncertainty rather than valuation mechanics

32. Our concern here is not that assets installed on land should never be treated as real property. Rather, it is that the draft legislation does not clearly articulate a limiting principle tying application of the definition to assets whose value is substantially attributable to their connection with land, as opposed to assets that merely require physical installation in order to function.

33. While the principal asset test in section 855-30 has historically not contained an explicit valuation threshold for which real property assets are captured, the current draft goes materially further by:

    (a) extending the definition to things merely "installed" (not fixed) on land; and

    (b) separately capturing licences and contractual rights exercisable "over or in relation to" land.

34. Taken together, these extensions create uncertainty at the margins about what is intended to be in scope at all, even before valuation questions arise. In practice, this may affect technology-enabled infrastructure, control or monitoring assets, and short-life or mobile assets that are repeatedly installed yet derive most of their economic value from IP, data or network effects rather than land per se.

35. While valuers may be able to address how much value is attributed to a particular interest, it does not resolve the threshold question of whether an interest is intended to be treated as real property in the first place.

36. A brief statutory clarification that the definition is directed at assets whose value is materially dependent on land (consistent with the EM's repeated policy statements) would materially improve certainty without narrowing the intended tax base.

Double tax agreements

37. Consequential amendments being made to the *International Tax Agreements Act 1953* (**ITAA 53**) effectively mean that this new expanded domestic law meaning of "real property" also applies for the purposes of any double tax treaty with another country that expressly provides for "real property" in Australia to have the meaning provided by Australian law.

38. The Committee is concerned that this unilateral move to effectively override negotiated treaty positions will:

    (a) be inconsistent with negotiated positions that Australia has reached with other countries and upset key trading partners;[8] and

[8] We note that the United States has already raised concerns regarding the Australian Taxation Office's interpretation of 'royalties' (refer to *Oracle Corporation Australia Pty Ltd & Ors v FC of T* [2025] FCAFC 145), noting that it would be inconsistent with United States Treasury regulations which provide that payments of the present kind are to be treated as payments in exchange for services which were not royalties. A foreign government may similarly be concerned with Australia's expansion of its taxing rights in relation to real property.

(b) cause foreign residents to consider that there is sovereign risk in investing in Australia.

39. A further issue is that the particular changes to the ITAA 53 would affect most but not all of Australia's double tax agreements. There are a number of treaties that expressly define "real property" or "immovable property" (e.g., the United States of America, United Kingdom, Chinese and Japanese treaties). Others rely on an interpretation provision which generally prescribes that terms that are undefined will have the meaning given by the laws of the relevant jurisdiction (e.g., the Korean treaty).

40. The Draft Legislation is expressed to apply to the extent that an agreement provides that the expression "real property" or "immovable property" has the meaning it has under the law of Australia. The Explanatory Materials indicate that the amendments will apply to all treaties that Australia has entered into, including those that rely on a general interpretation provision.

41. It is not clear that the proposed language extends this far. If that is so, it may be that a more restricted or technical legal definition of "real property" still applies when interpreting some treaties, meaning that the treaty may preclude Australia from exercising the expanded taxing rights it is now purporting to exercise under the amended Division 855.

365-day principal asset test—evidentiary and administration concerns

42. The 365-day look back raises a distinct and practical issue for investors whose asset mix sits close to the 50% threshold.

43. Market values, particularly commodities, fluctuate continuously, yet the draft legislation does not explain:

    (a) how a taxpayer is expected to evidence asset values at all points in time over the 365 day period; or

    (b) what level of valuation resolution is required to demonstrate compliance with the test.

44. In practice, this creates a risk that the test becomes effectively impossible to satisfy other than by adopting highly conservative assumptions, particularly for investors with diversified or development stage assets. This is not an avoidance concern, but an evidentiary and administrability one, and could be mitigated through guidance (for example, acceptable valuation proxies, tolerances, or specified testing points).

Non-resident CGT withholding

45. The Draft Legislation makes a number of changes to "Non-IARPI" (Non-Indirect Australian Real Property Interest) vendor notification requirements, significantly including increased notification and disclosure requirements that the Committee believes require attention before the legislation is finalised.

46. First, broadening the definition of taxable Australian real property is expected to materially increase the volume of transactions in which purchasers need to obtain ATO clearance and variation certificates—including transactions where the vendor is an Australian resident. The exposure draft does not appear to contemplate this consequence, and it is not apparent from the materials whether this outcome is a deliberate policy choice.

47. Second, the exposure draft leaves unresolved how the new ATO notification and declaration framework would apply to schemes of arrangement involving listed companies. These transactions are compulsory in nature, require court approval, and are conducted off-market. Despite this, no carve-out or tailored treatment has been provided under the proposed rules. The absence of bespoke guidance creates meaningful uncertainty for bidders, target boards and shareholders participating in such schemes.

48. Third, the standard by which a purchaser is taken to have known that a vendor's declaration is false, framed as what the purchaser 'could reasonably be expected to know', lacks sufficient definition. Of particular concern are scenarios where the Commissioner indicates, whether formally or informally, that a declaration may be incorrect. Without legislative clarity on how such a view affects a purchaser's position, purchasers face a risk exposure that cannot readily be managed even where they have acted in good faith in reliance upon a formal declaration.

49. Fourth, proposed subsection 14-210(4) of Schedule 1 to the *Taxation Administration Act 1953* (**TAA 53**) conditions a purchaser's ability to rely on a declaration on the vendor having itself notified the Commissioner and then providing confirmation of that notification to the purchaser. This structure inappropriately transfers to the purchaser the consequences of the vendor's failure to comply with its own notification obligation. If the withholding changes proceed, the condition in proposed paragraph 12-410(4)(a) should be removed, leaving only paragraph 12-410(4)(b) as the operative requirement for a purchaser seeking to rely on a declaration.

50. Fifth, the regime effectively requiring the purchaser to undertake due diligence on the seller seems impossible to comply with in respect of transactions conducted via a block trade managed by an intermediary.

51. Finally, the regime is proposed to be expanded for foreign vendors disposing of membership interests as part of transactions with an aggregated market value of $50 million or more by including 'related transactions'. This aggregation is achieved by proposed subparagraph 14-210(3)(d)(ii), which excludes transactions from these increased notification and disclosure requirements where:

> *… the transaction **and any related transactions that have been or are being undertaken** … is less than $50 million.*
>
> *[Emphasis added]*

52. At 1.64 to the Explanatory Materials, the purpose of this aggregation rule is stated as follows:

> *A notification must be provided to the Commissioner if the aggregated transaction value is $50 million or more, including related transactions calculated pursuant to subparagraphs 14-200(3)(a)(i) and (ii).* ***This ensures that what would be considered a single transaction with the requisite aggregated size is not artificially split into smaller transactions in order to circumvent the notification requirements.***
>
> *[Schedule #, items 22 and 23, paragraphs 14-210(3)(d) and 14-210(4)(a) in Schedule 1 to the TAA 53]*
>
> *[Emphasis added]*

53. We respectfully suggest that the words used in the Exposure Draft are unclear and risk being interpreted far more broadly than the Explanatory Materials would suggest was intended, by potentially aggregating interests of unrelated vendors, rather than only aggregating interests held by the relevant foreign vendor.

54. The Committee respectfully recommends that the non-resident CGT withholding provisions be revised to address the issues identified above. Specifically, the Government should:

    (a) confirm, as a matter of policy, whether the anticipated increase in clearance and variation certificate requests from transactions with Australian-resident vendors is an intended consequence of these changes;

    (b) introduce specific rules or targeted exclusions to address the application of the withholding regime to schemes of arrangement involving public companies;

    (c) legislate a clear and workable standard for when a purchaser will, and will not, be treated as having knowledge that a declaration is false, including the consequences of any view expressed by the Commissioner;

    (d) remove proposed paragraph 12-410(4)(a) so that purchasers are not exposed to risk arising from a vendor's failure to notify the Commissioner; and

    (e) clarify proposed paragraph 14-210(3)(d)(ii) by inserting the following underlined words (or similar):

    > *… the transaction and any related transactions that have been or are being undertaken* ***by the entity referred to in subsection 14-210(1) and *Connected Entities*** *… is less than $50 million.*

Further contact

55. The Committee would be pleased to discuss any aspect of this submission.

56. Please contact either Judith Taylor (Deputy Chair) [redacted] (at first instance) or Neil Brydges (Chair) [redacted] if you would like to do so.

Yours sincerely



Adrian Varrasso
Chair, Business Law Section