24 April 2026

Director
International Tax Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: MNETaxIntegrity@treasury.gov.au

Dear Director,

Strengthening the foreign resident capital gains tax regime – draft legislation

The Institute of Public Accountants and Tax Institute (together, the **Joint Bodies**) welcome the opportunity to make a submission to the Treasury in respect of its consultation on the:

- exposure draft Treasury Laws Amendment Bill 2026: Strengthening the foreign resident capital gains tax (**CGT**) regime (**draft Bill**) and accompanying explanatory memorandum (**draft EM**);
- exposure draft Treasury Laws Amendment Bill 2026: Renewable energy asset discount capital gains for foreign residents and accompanying explanatory memorandum.

In developing this submission, we have closely consulted with members of the Joint Bodies who have specific knowledge, experience and expertise in corporate and international taxation to prepare a considered response that represents the views of the Joint Bodies' broader memberships.

Preliminary comment on consultation timeframe

We note that in The Tax Institute's 2024 submission to the strengthening the foreign resident capital gains tax regime Consultation Paper, we raised a preliminary concern that both that consultation and the Tax Practitioners Board (**TPB**) registration review were released concurrently. Given that both processes involved critical and systemic changes to the tax framework, this overlap was problematic.

A similar approach has been repeated in the present case but with even tighter consultation periods. This consultation was released on Friday, 10 April 2026, followed closely by the release of the draft legislation for the TPB sanctions reforms on Monday, 13 April 2026. The consultation on the Instant tax deduction – exposure draft was released on Monday, 20 April 2026 and overlaps with these consultations. Each of these measures is open for consultation for only two weeks, despite involving proposals for significant systemic changes.

The time period also overlaps with the period of the Board of Taxation's *Statutory review of Australia's thin capitalisation reforms*.

A two-week consultation window does not provide sufficient time for stakeholders to properly analyse the proposals, assess their practical impacts, or engage meaningfully with the reform process – particularly in the present case, where the proposed CGT changes substantially depart from concepts raised in earlier consultation and are proposed to apply retrospectively.

Our concerns in the present case are exacerbated by the fact that the original proposed changes were announced almost two years ago, in the 2024-25 Federal Budget delivered on 14 May 2024, and neither that announcement, nor the 2025-26 Federal Budget announcement on 25 March 2025 suggested any element of retrospectivity in the proposal.

Stakeholders within the tax profession require adequate time to understand the practical and operational implications of multiple reform proposals, which may involve obtaining feedback from members, before finalising positions and making informed recommendations. Rushed consultation processes reduce their effectiveness, increase the risk of poor policy outcomes and unintended consequences, and undermine public confidence in the tax system.

The Office of Impact Analysis states in its March 2023 *Australian Government Guide to Policy Impact Analysis* report (**OIA Report**) that when detailed information is provided as part of a consultation, stakeholders require sufficient time to understand, consider and respond, and that consultation periods 'should not be less than 30 days', and may be as much as 60 days depending on complexity. The OIA Report further notes that, where proposals are large or sensitive, additional time may be required to allow responses to progress through boards or other governance frameworks.

We encourage Treasury to consider the OIA Report in planning for future consultations to ensure stakeholders can effectively contribute and support the Government in the design and implementation of changes to the tax system for the benefit of all Australians and our economy.

Interaction between the proposed legislation and the ATO's administrative statement

We note that the Australian Taxation Office (**ATO**) released an administrative statement on 16 April 2026 (later updated on 21 April 2026) on the proposed measure, outlining its practical approach to the retrospective application of the proposed changes. Given that the measure has not yet been enacted, the updated statement may contribute to perceptions that stakeholder consultation may not be meaningfully considered either in the finalisation of the legislation or the proposed date of application, particularly where the statement appears to assume passage of the measure in its current form. In any event, we trust that any retrospective application of the proposed measure are addressed conclusively as part of the consultation and legislative process, and not through reliance on an administrative statement.

Summary of key concerns

We support the objective of protecting the integrity of the Australian tax system. However, we consider that the proposed measure goes well beyond that objective and raises serious issues of policy design, legal certainty and investor confidence in Australian tax settings.

In particular, we have significant concerns regarding:

- the significant expansion of the scope of taxable Australian real property (**TARP**) beyond its established general law meaning, capturing a wide range of interests, rights and assets connected with land that have historically not been subject to Australian CGT for non-residents;
- the fact that judicial authority, legislative history and prior ATO guidance support the position that 'real property' in Division 855 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) currently takes its general law meaning, such that the proposed amendments constitute a substantive expansion rather than a clarification of existing law;
- the proposed retrospective application of the expanded definition to 12 December 2006, which represents a material departure from previous budget announcements and long-standing stakeholder expectations, with no transitional or grandfathering relief provided;
- the exposure of non-resident investors to tax liabilities for historical transactions that were not taxable under the law as it was reasonably understood at the time, undermining confidence in the stability and predictability of Australia's tax system;
- the practical implications of retrospectivity, where affected non-residents typically do not lodge Australian tax returns, meaning standard assessment time limits may not apply and taxpayers could be assessed many years or even decades after a transaction occurred;
- the significant uncertainty created by the potential for retrospective assessments, including financial reporting and disclosure implications, and reputational risk;
- the proposed treaty override, which expands Australia's taxing rights by redefining references to real or immovable property in certain tax treaties, increasing treaty uncertainty and the risk of treaty disputes, notwithstanding that the override is not retrospective (albeit, as discussed below, the retrospectivity of the general changes may affect residents in a number of key treaty jurisdictions, including the United States and Canada);
- the disproportionate impact of the retrospective changes on investors from non-treaty (and potentially pre-2006 treaty) jurisdictions as a result of the differing treatment of investors in treaty and non-treaty cases;
- the expansion of the indirect Australian real property interest rules, including the broader asset base and the 365-day testing period, which is expected to significantly increase compliance costs, valuation complexity and dispute risk;
- the inclusion of renewable energy assets within the expanded definition of taxable Australian real property, despite such assets often not being real property at general law (and not merely because of the operation of statutory severance rules), creating tension with broader policy objectives to attract renewable energy investment;
- the limited effectiveness of the proposed time-limited CGT discount for certain renewable energy assets, given its narrow application period, restrictive eligibility criteria, and inapplicability to retrospectively taxed gains;
- the substantial changes to the non-resident CGT withholding regime, which shift risk and compliance obligations onto purchasers, increase transaction complexity and introduce uncertainty due to the lack of a clear dispute resolution pathway; and

- the cumulative effect of these measures in increasing uncertainty, retrospective risk and compliance burdens, with potential adverse consequences for foreign investment confidence, treaty partner relationships, and the integrity of Australia's tax system.

While the need to support the integrity of Australia's CGT base is acknowledged, this objective needs to be balanced against the draft Bill's policy and practical impacts. The draft Bill expands 'taxable Australian real property' beyond its established general law meaning, applies retrospectively from 12 December 2006, and gives rise to significant valuation, treaty interpretation, and compliance risks.

Our detailed observations and recommendations to improve the policy design of this measure are contained in **Appendix A**.

Having regard to the nature and scope of the concerns outlined in this submission, we consider that further consideration and consultation, within a reasonable timeframe, are necessary to progress this measure. Without such reassessment and adequate consultation, there is a significant risk that the measure may result in severe unintended outcomes and undermine confidence in the Australian tax system.

Our submission is intended to be a starting point for further discussion and consultation. We invite Treasury to contact The Tax Institute's Tax Counsel, John Storey, on (03) 9603 2003, to arrange a meeting with the Joint Bodies to discuss the issues outlined in our submissions and work constructively towards achieving balanced and practical outcomes to protect Australia's revenue base without deterring much needed foreign investment. We would also be pleased to assist Treasury with proposed drafting to improve the draft Bill and draft EM.

Yours faithfully,

Tony Greco
Senior Tax Advisor
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The Tax Institute

APPENDIX A

We have set out below our detailed comments and recommendations for your consideration.

Expansion of Australian real property

Under current law, non-residents are subject to Australian CGT on the disposal of taxable Australian property, which relevantly includes TARP and indirect Australian real property interests. TARP has historically been understood and accepted as real property situated in Australia, informed by general law concepts.

Judicial authority, legislative history and administrative practice support this position. The Federal Court decisions in *YTL Power Investments Limited v Commissioner of Taxation* [2025] FCA 1317 and *Newmont Canada FN Holdings ULC v Commissioner of Taxation (No 2)* [2025] FCA 1356 confirmed, following a review of the text, context and history of the rules, that 'real property' in Division 855 of the ITAA 1997 takes its general law meaning. This interpretation is consistent with earlier ATO guidance and private binding rulings, which relied on the distinction between fixtures and chattels, and is consistent with the intention for 'land' in Division 855 to take its general law meaning. Where Parliament has intended to go beyond general law concepts, it has done so expressly, such as through the 2009 amendment to include leases of land. Further, the assertion that 'real property' in Division 855 was not intended to be affected by the general law concept of fixtures and chattels, or by State-based statutory severance rules, ignores that by the time Division 855 was enacted, a number of States had amended their duty laws to expressly move away from the general law concept of real property to include items fixed to land which were not fixtures – either at common law or as the result of statutory severance.

The draft Bill proposes a substantially broader definition of real property, extending to interests, rights, licences and contractual arrangements connected with land, as well as assets fixed or installed on land for the majority of their useful life, regardless of their status under general law or State and Territory law. The draft EM (in Example 1.2) also indicates that an asset which will be fixed to different parcels of land over its life would fall within the new definition of real property, even though the statutory language implies that an asset should only be captured where it is intended to be situated on the same land for the majority of its useful life. We consider that these changes constitute a clear expansion of the tax base, rather than a clarification of existing law.

The expanded definition would bring within scope assets that have traditionally been treated as chattels, including renewable energy infrastructure, mining and processing equipment, tenant's fixtures and statutorily severed assets. Licences relating to land would also be captured, creating uncertainty for longstanding commercial structures, including public private partnership arrangements. We also are of the view that the breadth of the proposed definition gives rise to significant uncertainty in relation to commonplace statutory and regulatory licences that are geographically linked but do not confer proprietary interests in land.

By way of example, it is unclear whether liquor licences, gaming licences, port access licences or similar authorisations that apply in respect of a specific location could be characterised as 'contractual rights in relation to land', notwithstanding that such licences have traditionally been treated as distinct from interests in real property. The absence of clear statutory boundaries risks drawing a wide range of regulatory permissions into the CGT net in circumstances not previously contemplated by Division 855 of the ITAA 1997, and potentially not intended now, noting that the draft EM does not indicate that these types of assets were intended to fall within the scope of the new rules.

We are also concerned that the reference to 'contractual rights over a thing which is fixed or installed on land' could inadvertently extend to ordinary commercial arrangements that are not intended to convey rights akin to ownership or use of real property. For example, tolling or processing contracts that require goods to be processed at a particular plant or facility may, under a literal reading, be characterised as contractual rights 'over' that plant. This would represent a significant and unintended expansion of scope, capturing service and supply arrangements that have historically sat well outside the concept of real property.

Recommendation

The definition of taxable Australian real property should be reconsidered and narrowed so that it does not extend beyond assets that are properly characterised as real property under general law, except where there is a clear and compelling policy justification. Any expansion beyond general law concepts should be targeted, clearly articulated and prospective.

Further, Treasury should clarify, either through statutory drafting or express exclusions, that the expanded definition of taxable Australian real property is not intended to capture:

- statutory or regulatory licences that are geographically linked but do not confer proprietary rights in land; and
- ordinary commercial or service contracts (including tolling and processing arrangements) that require use of specific facilities but do not convey rights analogous to ownership, possession or control of real property.

If Treasury is concerned about how the rules apply to certain arrangements, those arrangements should be clearly and specifically listed in the legislation. This is consistent with the approach already taken for water entitlements and mining information.

Arrangements that are not intended to be covered should be clearly excluded in the law itself. For example, the draft EM says that a licence to access premises, where that access is only incidental to providing on-site services, is not intended to be treated as real property. However, this exclusion does not appear in the legislation. To provide certainty and avoid unintended outcomes, this exclusion should be expressly included in the legislation rather than relying on the EM.

Retrospective application

We are deeply concerned by the proposal to apply the expanded definition of real property retrospectively to 12 December 2006.

The original announcement in the 2024-25 Federal Budget delivered on 14 May 2024 stated that the amendments would apply to CGT events commencing on or after 1 July 2025. The subsequent announcement in the 2025-26 Federal Budget delivered on 25 March 2025 deferred the commencement date from 1 July 2025 to the later of 1 October 2025 or the first 1 January, 1 April, 1 July or 1 October after Royal Assent. At no stage during these announcements was any retrospective application indicated.

We are particularly concerned that, despite a significant expansion in scope, the current proposal includes no transitional or grandfathering relief. This represents a departure from established and accepted practice for reforms that bring new classes of assets within the tax net and materially exacerbate the adverse effects of retrospectivity. A recent and relevant example where transitional relief was provided is the sovereign immunity reforms under Division 880 of the ITAA 1997, which provided a market value tax cost base reset for assets transitioning into the tax net under section 880-25 of the *Income Tax (Transitional Provisions) Act 1997* (Cth).

The ATO has issued a statement indicating that it generally will not seek to apply the changes beyond the standard four-year review period. However, this statement is caveated and does not provide investors with sufficient certainty or comfort. Administrative guidance cannot substitute for clear legislative settings, particularly where retrospective application is proposed, and an administrator cannot be expected not to apply a law change retrospectively in circumstances where the legislature has clearly and intentionally given the law change retrospective effect. If the Government intends to limit the practical application of retrospectivity, it should codify that limitation in the legislation itself, rather than relying on administrative assurances that may be withdrawn or qualified over time, or otherwise not applied.

We consider that applying the expanded definition of real property retrospectively to 12 December 2006 is neither fair nor equitable, particularly given the longstanding understanding of the law and reliance placed on prior government announcements. The proposal represents a clear departure from earlier Federal Budget announcements and long-standing stakeholder expectations.

The Joint Bodies maintains our longstanding strong view that the enactment of legislation prior to its effective start date is a fundamental feature of a properly functioning legislative process. Traditionally, the retrospective application of tax law has been the exception rather than the rule and has generally been limited to unique circumstances and substantially shorter periods than are currently proposed. Where retrospective application has occurred, it has often been accompanied by appropriate transitional or grandfathering provisions to mitigate unfair outcomes.

A strong and trusted government–taxpayer relationship is a crucial element of an effective tax system, and fairness, certainty and transparency are essential to maintaining that relationship. The ability to rely on the law is a fundamental pillar of Australia's legislative framework. Taxpayers should be confident that they are making informed decisions based on existing law, without the risk of sudden or retrospective changes that may jeopardise their economic viability or result in historical non-compliance that is difficult and costly to rectify.

We also emphasise the importance of a predictable tax framework in maintaining Australia's attractiveness as an investment destination. Retrospective tax changes increase investment risk and may deter foreign investors from committing to capital-intensive projects in Australia. Such outcomes can reduce economic activity, limit opportunities for job creation and place Australia at a disadvantage in an increasingly competitive international investment environment.

Recommendation

The proposed retrospective application should be abandoned. If the amendments proceed, they should apply only prospectively from a clearly communicated commencement date.

Additionally, given that the rules result in a substantial broadening of the tax base, they should include either grandfathering rules (which exempt historic investments from the changes) or transitional rules which provide non-residents with a cost base in their investments affected by the broadening which is based on the market value of the assets at the time the changes take effect.

If the Government's policy objective is primarily to prevent refund claims to limit unforeseen exposure to the Federal Budget, we consider that this could be achieved through a more targeted approach that does not rely on broad retrospective operation. One option would be to limit the retrospective effect to objections made against assessments already issued, rather than applying the amended law more generally.

We therefore suggest amending proposed Item 20(4) so that the modified operation of section 855-20(a) applies only for the purposes of objections to existing assessments, rather than enabling the retrospective application of the law in a broader context.

This could be achieved by amending the proposed Item 20(4) as follows (suggested additions in **bold**):

> Paragraph 855-20(a) of the Income Tax Assessment Act 1997 (as in force at any time before the commencement of this item) is taken, **for the purposes of an objection made by a person under section 175A of the Income Tax Assessment Act 1936 against an assessment made before this item commences (other than an assessment which is inconsistent with a prior agreement between the person and the Commissioner),** always to have applied as if a reference in that paragraph to real property situated in Australia included a reference to:
>
> …

This approach would address Treasury's concerns while preserving certainty, fairness, and confidence in the tax system.

We also recommend the Treasury to consider whether there is scope to limit the ATO's ability to revisit positions where transactions have previously been reviewed and accepted through established ATO engagement or assurance programs.

Scope of persons affected by the retrospective modification of section 855-20(a)

We are concerned regarding the retrospective modification to section 855-20(a), which is expressed to apply 'in relation to CGT events' occurring before commencement. While it is assumed that the intention is for the retrospective application to affect only the taxpayer to whom the CGT event occurred (for example, the vendor), this is not clearly stated.

The deeming language is broad, providing that the modified provision is taken to have 'always' applied. Without further limitation, there is a risk that this retrospective operation could be interpreted as applying beyond the taxpayer directly involved in the CGT event. For example, advisers who provided advice based on the law as it applied at the time of the transaction could potentially be exposed to unintended consequences if the provision is treated as having always operated in a modified form.

Recommendation

We recommend that the class of persons affected by the retrospective modification to section 855-20(a) be clearly and narrowly defined. In particular, the legislation should confirm that the retrospective operation applies only to the person who derived the gain or loss from the relevant CGT event.

Principal asset test

We are of the view that the proposed changes to the principal asset test will increase compliance costs and add complexity. The proposed changes will require more frequent and detailed valuations, which are costly and uncertain, particularly where asset values change over time.

We also consider that the need for these changes is unclear. Existing rules already deal with the main integrity risks, including the specific 'asset stuffing' rule in section 855-30(5)[1] and the general anti-avoidance rules. We are of the view that additional rules to prevent assets being transferred out of Australia are unnecessary, as gains on taxable Australian real property are already subject to tax.

We also note feedback from our members that valuation disputes are already increasing, and the proposed changes are likely to make these disputes more frequent without delivering a clear integrity benefit.

Finally, we consider that the proposed change may result in double taxation or inappropriate taxation. For example, where an entity holds two major mining projects in different countries in respect of different commodities, movements in spot and future commodity prices may result in more than 50% of the entity's value being attributable to mining assets in different countries throughout a 12-month period, such that both countries may assert a right to tax gains on disposal of interests in the entity. Similarly, where an Australian entity disposes of its real property assets (paying tax on any realised gain) and then invests in other asset classes, a non-resident investor would be subject to tax on disposal of an interest in that entity over the next 12 months, notwithstanding that tax has already been levied on the real property-related gain.

[1] An asset removal rule is not required, as the disposal of an asset would separately be taxed to the disposing entity where appropriate.

Recommendation

We recommend reconsidering or significantly limiting the proposed changes to the principal asset test. We are of the view that existing integrity rules should be relied on rather than introducing new and complex requirements particularly where there has not been any identified concern in relation to how those rules operate, or any gaps in their application. If changes proceed, it is important that the need for the changes is clearly articulated, and we consider that the rules should be simplified and include clearer valuation guidance or safe harbours to reduce uncertainty and disputes.

Treaty override

The draft Bill includes a treaty override to redefine references to 'real property' or 'immovable property' in Australia's tax treaties as references to TARP.

We acknowledge that, given the expanded scope of Division 855 of the ITAA 1997, such an override may be necessary if the changes are to apply to residents of treaty countries, particularly given recent judicial comments on the meaning of 'real property' in the treaty context. However, we are concerned that unilateral treaty overrides increase uncertainty and the risk of treaty disputes and may strain relationships with Australia's treaty partners.

We are also concerned that the proposed measures are likely to lead to an increase in Mutual Agreement Procedure (**MAP**) cases. This is because taxpayers may need to rely more heavily on MAP to resolve situations in which domestic tax actions are inconsistent with Australia's tax treaty obligations.

We also note the OECD's legal instrument, the *Recommendation of the Council concerning Tax Treaty Override*, which clarifies that member countries should avoid introducing legislation that would override or clearly contradict their international treaty commitments. To the extent the proposed measures give rise to outcomes that conflict with treaty obligations, increased MAP activity is likely, and could place additional pressure on both taxpayers and tax administrators.

The fact that the treaty override is not proposed to apply retrospectively (as outlined in the draft EM), while the domestic law changes are, further demonstrates that the proposal constitutes an expansion of taxing rights rather than a mere clarification. However, our members are concerned that the non-OECD model treaty standard reservation of CGT taxing rights position adopted in treaties Australia entered into prior to 2006 with a number of key trading partners (including the US, Canada, UK, China and India) may result in the proposed changes operating retrospectively for residents of those countries, perhaps unintentionally.

We also consider that the differential treatment of new and old treaty, and non-treaty, cases means that investors from old treaty and non-treaty jurisdictions may be disproportionately affected by the retrospective application of the proposed changes.

Further, we raise concerns about the lack of clarity regarding the date of application of the treaty override provisions. While the draft EM refers to an application provision at item 37, the draft Bill does not include item 37. As a result, the proposed legislative position on commencement and application cannot be clearly identified. We consider that meaningful consultation is not possible where key operative provisions are not available for review.

Recommendation

If the retrospectivity of the TARP changes is pursued (contrary to our recommendation set out above), the treaty override should be applied narrowly, prospectively in respect of all treaties, and only to the extent necessary to support clearly defined policy objectives. Treasury should engage proactively with treaty and non-treaty partners to provide clear guidance so as to minimise treaty disputes and uncertainty.

Also, we recommend that the draft Bill is updated to include the missing application provision so that stakeholders can properly assess the scope and impact of the proposed amendments.

Indirect Australian real property interests

We consider that the draft Bill also expands the indirect Australian real property interest rules. This occurs through the broader taxable Australian real property definition, the deeming of mining, quarrying and prospecting information as taxable Australian real property for testing purposes, and the requirement to apply the principal asset test both at the time of disposal and over the previous 365 days.

We expect these changes to materially increase compliance costs and the likelihood of valuation disputes, particularly where asset values fluctuate around the relevant thresholds.

Recommendation

The indirect interest rules should be refined to reduce unnecessary compliance burdens, including reconsideration of the extended testing period and clearer valuation safe harbours where asset values are closely balanced.

Renewable energy assets

We consider that renewable energy assets highlight many of the problems with the proposed changes. These assets are often not treated as real property under existing law (both under a general law fixtures v chattels analysis and/or as a result of statutory severance), and are therefore not currently taxed when non-residents sell them. Bringing these assets into the tax net is, in our view, inconsistent with wider policy goals to attract renewable energy investment, especially given other recent tax changes affecting foreign investors.

We are of the view that the proposed CGT discount for renewable assets does not adequately address these issues, and will not operate to attract any new investment in the sector given the extremely limited nature of the concession. The discount is narrow, temporary, and does not apply to gains that are taxed retrospectively. Members of the Joint Bodies also consider the eligibility rules to be unclear, particularly for projects that combine power generation with energy storage.

As drafted, the discount does not appear to apply to standalone battery energy storage system (**BESS**) projects, and it is unclear whether combined generation and storage projects would qualify. Also, we are of the view that the four-year limit does not align with the way renewable projects operate in practice. These projects typically take many years to plan, finance and build, and are rarely sold within such a short timeframe – at a minimum the short application period means that the concession will not attract any new investment (though it may limit the cost to existing investments at the margin) since any new projects which raise investments after the changes are passed will almost certainly not be sold by 30 June 2030. As a result, the proposed CGT discount is unlikely to encourage new investment, and any concessionary application will be limited to a small number of existing projects.

We also consider that it unclear why the discount does not apply to past sales if the policy intent is to reduce the impact of bringing existing renewable assets into the tax net. The difference between retrospective taxation and purely prospective relief gives rise to concerns that the measure does not provide meaningful assistance to those most affected.

Recommendation

We recommend excluding renewable energy assets from the expanded definition of taxable Australian real property to better align with broader policy objectives. If this is not adopted, we consider that clear and ongoing transitional relief should be provided, either with an indefinite application period or one that reflects normal infrastructure investment timeframes. Any concession should unequivocally cover energy storage projects, including BESS, and better address the impact of retrospectivity.

Non-resident CGT withholding

The Joint Bodies are concerned about the practical operation of the proposed changes to the non-resident CGT withholding rules.

We consider that the expanded definition of taxable Australian real property is likely to significantly increase the number of transactions where purchasers seek ATO clearance certificates, including for asset sales by Australian-resident vendors. The draft Bill and draft EM do not appear to acknowledge this outcome, and it is unclear whether this increased use of clearance certificates is intended.

We are of the view that the draft Bill also does not adequately address how the new ATO notification and declaration process would operate for schemes of arrangement involving public companies. Schemes of arrangement are off-market transactions and are not carved out of the withholding regime, yet the proposed rules do not appear to reflect the compulsory and court-approved nature of these transactions. This creates uncertainty for bidders, target companies and shareholders.

We also consider that the rules around when a purchaser ‘could reasonably be expected to know’ that a declaration is false require much clearer guidance. In particular, we are concerned about the position where the Commissioner expresses a view that a declaration is incorrect. Without clearer legislative rules, purchasers may be exposed to significant and unmanageable risk despite having relied on formal declarations.

Finally, the proposed requirement in subsection 14-210(4) that a purchaser can only rely on a declaration where the vendor provided the declaration to the Commissioner and provides a declaration to the purchaser that the vendor has provided the declaration to the Commissioner, unreasonably shifts to the purchaser the risk of the vendor not appropriately notifying the Commissioner of the declaration. Accordingly, if these changes are maintained, subparagraph 12-410(4)(a) should not be a condition which must be satisfied for a purchaser to rely on a declaration, i.e. only subparagraph 12-410(4)(b) should be retained.

Recommendation

We recommend that the non-resident CGT withholding provisions be revised to provide greater clarity and certainty. In particular, the Government should:

- clarify whether increased reliance on clearance certificates for transactions involving Australian-resident vendors is intended;
- provide specific rules or carve-outs for schemes of arrangement involving public companies;
- clearly set out when a purchaser will, and will not, be taken to have knowledge that a declaration is false, including the effect of any view expressed by the Commissioner; and
- not introduce proposed subparagraph 12-410(4)(a) which unreasonably allocates risk to a purchaser.

We consider these changes are necessary to reduce transaction risk and avoid unintended consequences for both purchasers and vendors.

ATO enforcement and financial statement disclosures

We are of the view that in many cases, the disposals affected by the retrospective operation of the measure may not be time-barred, as non-resident vendors typically do not lodge Australian tax returns where no tax liability is expected. While we acknowledge the practical challenges associated with identification, enforcement and collection, our members are particularly concerned about the financial reporting and disclosure implications of the proposed retrospectivity.

Accounting standards may require affected entities to undertake extensive reviews of historical transactions to identify potential Australian tax exposures, including primary tax, penalties and interest. This may result in the need to recognise or disclose contingent liabilities in financial statements, even where the likelihood of enforcement or collection may be uncertain. We understand that this process is likely to be resource-intensive, costly and disruptive, and may create significant uncertainty for entities with historical investment activity in Australia.

We note that these financial reporting consequences arise solely as a result of the proposed retrospective operation, rather than any change in current or future commercial behaviour.

Recommendation

We recommend that the Government reconsider the retrospective operation of the measure in light of its downstream financial reporting and compliance impacts.

Budget costings

The original Federal Budget costings released in May 2024 estimated revenue of approximately $200 million per annum, based on one or more capital gains totalling around $600 million. We consider it reasonable to infer that, as at May 2024, the Government did not intend for the measure to operate retrospectively.

Given the subsequent introduction of a retrospective element and the significant expansion in scope of the measure, we are concerned that the original Federal Budget costings are no longer reliable or appropriate. The proposed retrospective application materially alters the population of affected transactions and taxpayers and therefore represents a substantial change in the policy scope underpinning the original revenue estimates.

Where a measure undergoes a significant change in scope, updated costings should be provided to ensure transparency and integrity in the policy process. We also observe that a similar issue arose during the development of the thin capitalisation reforms, where the introduction of debt deduction creation rules, part way through the process, materially altered the scope of the package.

Recommendation

We recommend that updated Federal Budget costings be released to reflect the expanded and retrospective scope of the measure, enabling stakeholders and policymakers to properly assess its revenue impact and policy justification.