INFRASTRUCTURE PARTNERSHIPS AUSTRALIA

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Federal Treasury

Via submission link

SUBMISSION TO THE FEDERAL TREASURY IN RESPONSE TO ITS DRAFT LEGISLATION ON STRENGTHENING THE FOREIGN RESIDENT CAPITAL GAINS TAX REGIME

Infrastructure Partnerships Australia is an independent think tank and executive member network, providing research focused on excellence in social and economic infrastructure. We exist to shape public debate and drive reform for the national interest. As the national voice for the infrastructure sector in Australia, our membership reflects a diverse range of public and private sector entities, including infrastructure owners, operators, financiers, advisers, technology providers and policymakers.

Infrastructure Partnerships Australia draws together the public and private sectors in a genuine partnership to debate the policies and priority projects that will build Australia for the opportunities and challenges ahead.

Please find below a submission to the Treasury, prepared by Infrastructure Partnerships Australia's Tax Policy Taskforce on the exposure draft legislation, "Strengthening the foreign resident capital gains tax regime."

Infrastructure Partnerships Australia and its Tax Policy Taskforce look forward to further assisting the Treasury on this consultation. If you require additional detail or information, please do not hesitate to contact Katie Dempsey, Senior Policy Manager, at katie.dempsey@infrastructure.org.au.

Yours sincerely,



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RESPONSE TO EXPOSURE DRAFT LEGISLATION AND EXPLANATORY MATERIALS

Infrastructure investors rely on long-term investment certainty to deliver essential economic and social infrastructure across Australia. Accordingly, stability, predictability and consistency in the tax system are critical to sustaining investment confidence in the sector.

Infrastructure projects in Australia have required significant private sector support, and this will continue to be the case for decades to come. A substantial proportion of that support has historically been provided by foreign institutional investors. The introduction of the draft legislation in its current form will make Australia a relatively less attractive destination for foreign infrastructure investment. Unlike other asset classes, the scale and complexity of infrastructure requires investors to make long-term, often multi-decade commitments.

Over the past 15 years, Australia has seen ongoing and cumulative changes to the foreign investment and international tax landscape. As a result of reforms to stapled structures, managed investment trusts, thin capitalisation and now non-resident capital gains tax (CGT), foreign investors may face effective tax rates at or above 30 per cent.

While we acknowledge the Government's objective of protecting the Australian tax base, the Tax Policy Taskforce has significant concerns that key aspects of the draft legislation, most notably the retrospective expansion of the meaning of "*Real property*" depart materially from established principles of sound tax policy, good governance and investment certainty.

If enacted as drafted, these measures would constitute retrospective tax legislation rather than a clarification of existing law. Retrospective changes of this nature undermine legal certainty and increase sovereign risk for foreign investors who have made long-dated infrastructure investments in good faith reliance on the law as it stood at the time of investment.

In this context, the proposed amendments sit uneasily with the Government's *Australia welcomes foreign investment* statement, particularly its emphasis on strong governance and legal systems. The proposed changes also go further than comparable regimes internationally. When combined with an effective tax burden for foreign investors approaching 30 per cent, Australia faces increasing challenges from a global competitiveness perspective. By contrast, jurisdictions such as the United Kingdom and France provide exemptions for real property used in a trade or business.

The retrospective operation of the draft legislation also raises substantial practical and governance concerns. Company directors, fiduciaries, tax agents and auditors are required to comply with the law as enacted, not to assess tax positions by reference to the perceived likelihood of compliance activity. The Australian Taxation Office's proposed administrative approach does not adequately mitigate the commercial, accounting, compliance and financial reporting consequences that would arise if historic transactions were retrospectively brought within the tax net.

The Tax Policy Taskforce also welcomes, in principle, the introduction of transitional CGT relief for renewable energy investments; however, submit that its current design is unduly narrow. It excludes critical supporting infrastructure such as transmission and storage assets, applies overly-rigid ownership thresholds, and sunsets too early to meaningfully influence investment decisions aligned with Australia's net-zero commitments. The

Tax Policy Taskforce proposes these settings should be broadened and extended to ensure the relief effectively supports the energy transition.

In light of the above, the Tax Policy Taskforce submits its response to the public consultation process by identifying the following key issues in the current exposure draft materials and proposed solutions for clarifying the position in the final bill. These issues and proposed solutions are described in further detail at Appendix 1 to this submission.

Area	Key Issue Identified	Proposed Solution
Retrospective expansion of "real property"	The retrospective expansion of the definition of "real property" goes beyond its established meaning under Australian case law (including TEC Desert, YTL and Newmont) and constitutes retrospective tax legislation rather than a clarification of existing law.	Remove the retrospective amendments entirely and apply changes prospectively only. If this is not accepted, any retrospectivity should be expressly limited in legislation to the principle of *statutory severance* and a strictly defined period (at most the four-year period from the date of enactment).
Governance and practical impacts of retrospectivity	Retrospective changes could create unjust and inequitable outcomes, including asymmetric treatment of taxpayers, financial reporting impacts, reopened litigation and settlements, practical impossibility of historical TARP analysis, and significant compliance and collection challenges. ATO administrative statements do not sufficiently mitigate these risks.	For assets that have relied on the common law meaning of "real property", introduce clear grandfathering or transitional rules where assets are retrospectively brought into the tax net, consistent with established Australian tax governance principles (for example, the transitional / grandfathering rules that applied in relation to the pre-CGT asset regime, removal of the non-resident CGT discount in 2012 and staple structure amendments in 2019).
Overly broad prospective definition of real property	The new definition of "real property", including "*licences or contractual rights exercisable over or in relation to land*", is overly broad and vague. It is not sufficient that the potential for narrowing of the scope of this new definition is only considered in the Explanatory Materials (not the legislation), creating uncertainty over each. The new definition of real property does not differentiate from who's perspective the thing might be characterised as real property at general law.	Narrow the legislative drafting to align with policy intent by incorporating key limitations and clarifications directly into the definition of "real property", rather than relying on explanatory material. Include explicit carve outs such as for public private partnership (PPP) service-based arrangements and offtake arrangements. In addition, supplement Exposure Draft and Explanatory Materials with additional examples focused on PPPs, offtake arrangements and modern infrastructure assets. Make it clear whether an asset owned by a foreign investor but placed on land/leases/access rights owned by another person is to be counted as Australian real property for the foreign investor or for the other person.

Renewable energy CGT discount (asset scope)	The definition of "*Australian renewable energy asset*" is unduly narrow, focusing on generation and excludes critical supporting transmission and distribution infrastructure (including poles and wires) as well as broader assets integral to renewable projects. This approach does not fully reflect how renewable energy systems operate in practice and risks excluding assets that are essential to delivering renewable energy to end users.	Broaden the definition to include assets that are connected to, designed to operate with, or facilitate the storage, transmission or delivery of energy from renewable sources, rather than limiting eligibility to assets whose primary purpose is generation.
Renewable energy CGT discount (eligibility thresholds)	The 90 per cent test is overly rigid and may inadvertently exclude genuine renewable investments due to the presence of non-qualifying supporting assets (described above), or dormant land acquired to be later developed subject to approvals, etc.	Reconsider the threshold and assets included in scope of the discount, so that it better reflects the reality of integrated renewable energy investment structures. This could include lowering the threshold and / or aligning it with a broader, functionally based definition of renewable energy assets, to ensure that supporting and enabling infrastructure does not inadvertently disqualify genuine renewable investments from transitional relief.
Renewable energy CGT discount (sunset date)	The proposed sunset date of 30 June 2030 is inconsistent with renewable project development timelines and Australia's energy transition objectives, meaning the relief will have limited practical impact.	Extend the transitional CGT discount period to at least 2040 to align with typical project development, construction and holding periods, and Australia's net zero trajectory.

The Tax Policy Taskforce considers that implementing the above changes would materially improve the integrity, coherence and investability of the regime while still supporting the Government's objective of protecting the Australian tax base.

Appendix 1

1. Retrospectivity of real property definition

The Tax Policy Taskforce respectfully puts forward that it has significant concerns with the retrospective amendments to the meaning of "*real property"* contained in item 20(4) of the Exposure Draft, which extend beyond the existing meaning of *real property* (as supported by case law such as the TEC Desert decision in 2010 and the YTL Decision and Newmont Decision both in 2025) and therefore if enacted, would constitute retrospective tax legislation. The Tax Policy Taskforce submits that retrospective amendments represent a significant departure from the established tax law position and are not merely clarificatory.

In this regard:

- the existing meaning of *real property* is explained in the YTL Decision (*YTL Power Investments Limited v Commissioner of Taxation of the Commonwealth of Australia* [2025] FCA 1317), where at paragraph [120] Hespe J states:

  > …..The term "real property" bears a technical meaning in the general law: *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576 at [14].

- Colvin J reached a similar conclusion in the Newmont Decision (*Newmont Canada FN Holdings ULC v Commissioner of Taxation (No 2)* [2025] FCA 1356), where at paragraph 585 Colvin J states:

  > [585] As was explained in TEC Desert at [14] a term such as 'real property' when used in a statutory regime is not to be assumed to have the technical meaning it bears in the general law. Whether it does so will depend upon context. Nevertheless, it has been said that where words which have acquired a legal meaning are used in a statute, then prima facie the legislature will be taken to have intended to use the words with that meaning 'unless a contrary intention clearly appears from the context': *Attorney-General for New South Wales v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 531 (O'Connor J). It is a view that was applied in *Barker v The Queen* (1983) 153 CLR 338 at 341 (Mason J), 355-356 (Brennan and Deane JJ).

- In paragraph [14] of the TEC Desert decision, the High Court states:

  > [14] Further, of terms such as "real property", "lease" and "fixture" it should be emphasised that, not only does each bear a technical meaning in the general law, but also when they appear in statutory regimes creating rights and imposing obligations it is not to be assumed that they are used simply and exclusively in the sense understood by the general law. Thus in *Western Australia v Ward* Gleeson CJ, Gaudron, Gummow and Hayne JJ, with reference to an earlier statement by Toohey J, treated the term "mining lease" as an example of looseness of terminology and said that the rights and obligations of the holder of an interest so described in particular legislation would not necessarily be determined simply by application of the nomenclature "lease". Earlier, in Commissioner of *Main Roads v North Shore Gas Co Ltd*, Barwick CJ, McTiernan, Kitto and Taylor JJ, when considering the particular statutory right of the respondent to lay and maintain gas pipes, remarked:

> "[W]hy should it be assumed that the exercise of a specific statutory right to lay and maintain pipes, as in the present case, operates to vest in the donee of the power an interest in the land in which the pipes have been laid? The conclusion that it does seems to us to result from a lawyer's inherent tendency to assimilate such a right to some category known to the common law."

- In paragraph [14] the High Court notes that it is also necessary to take account of the statutory regime in interpreting the term. We submit that, consistent with the YTL Decision, in the context of Division 855 the term 'real property' takes its technical common law meaning under current law.

- Also, the proposed inclusion in paragraph 20(4)(b) of the new definition of *real property* does not differentiate from who's perspective the thing might be characterised as *real property* at general law. This is at odds with existing law, where as noted in the YTL Decision, the term "real property" in the context of s 855-20 does not refer to the physical attributes of an item, rather in context, it refers to the estate or interest of an entity. Critically, it is the assets of the entity whose interest are being tested that are evaluated for the purposes of being *taxable Australian real property* or not.

- Paragraph 135 of the YTL Decision supports that, contrary to the proposed inclusion in paragraph 20(4)(b), the question of whether the thing is real property (as is understood under the existing law) is assessed from the perspective of the holder of the relevant asset whose status is being tested as *taxable Australian real property* – being the taxpayer, or the target entity in the case of the *principal asset test*. We reproduce paragraph 135 from the YTL Decision below:

  > [135] Contrary to the submissions of the Commissioner, the term "real property" in the context of s 855-20 does not refer to the physical attributes of an item. In context, it refers to the estate or interest of an entity. The phrase "taxable Australian real property" is used in reference to a "CGT asset" and forms part of a test for determining when an entity's underlying value is principally derived from assets that are taxable Australian real property. In that context, the reference to "taxable Australian real property" speaks of the interest which is vested in the entity or in another entity in which the first entity has a membership interest. It is only those interests which can be said to be an asset of the entity (cf *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 2]* (1987) 162 CLR 153 at 163).

- The proposed retrospective amendments would appear to result in the potential that the same underlying asset could be *taxable Australian real property* of two or more entities. For example, an asset may be treated as *taxable Australian real property* of an entity that is not the landowner (but which accesses the land via a licence/easement/access right/tenant fixture), whilst also constituting *taxable Australian real property* of the landowner.

Given the Government did not amend the law prospectively after the TEC Desert decision was published in 2010, it can be reasonably inferred that the Government was comfortable with the legal interpretations contained in the TEC Desert decision as it relates to Australian CGT.

State Governments have long recognised that the law of fixtures can result in assets attached to land not being a landholding, and that the State based statutory severance provisions impact on this. State-based duties legislation has addressed this issue through express severance and inclusive landholding provisions. For example:

- Victoria re-wrote the Landholder Duty provisions in the *Duties Act 2000* in 2012 to capture as a 'landholding' any asset fixed to an interest in land irrespective of whether that asset was a fixture at law, was separately owned from the land, or could be notionally severed or considered to be legally separate from the land as a result of the operation of any other Act or law.
- Victoria further amended the *Duties Act 2000* in 2019 with the intention that interests in fixtures created, dealt with, or held separately from an estate or interest in the land on which the fixtures are located are treated as 'dutiable property' (as well as 'landholdings' for landholder duty purposes), irrespective of whether the asset constitutes a fixture at law.
- Western Australia amended the *Duties Act 2008* in 2019 to adopt an inclusive definition of 'land,' capturing anything fixed to land, whether or not the thing constitutes a fixture at law, is owned separately, or is notionally severed or considered to be legally separate from the land.

There was also the opportunity to make the change in 2009 with the amendment to Division 855 to include leases in land. The intention at this time was to put beyond doubt that 'taxable Australian real property' includes leasehold interests, it is reasonable to infer that if it was necessary to further refine the concept of 'taxable Australian real property', this would have been undertaken at this time. It should be noted that while this amendment was said to accord with the intended application of the provisions when introduced, it was legislated as a prospective measure only.

2. Adverse consequences of retrospectivity

Following the release of the draft legislation, the ATO released a statement regarding its administrative approach once the law is enacted. Whilst this statement is a welcome indication of the ATO's current thinking, in both form and substance it does not provide sufficient certainty or protection for taxpayers. In particular, the statement is non-binding and affords the Commissioner a high degree of discretion, including through references to review only in "exceptional circumstances", without articulating what those circumstances may be. This creates ongoing uncertainty and makes it difficult for taxpayers and advisers to assess the practical consequences of the retrospective amendments or to provide reliable advice on how the law will be administered in practice, and we therefore consider the below to continue to represent real ramifications.

Management and Boards of large taxpayers and fiduciary organisations are not permitted to ignore material tax liabilities merely because the chances of ATO review are low - they are required to comply with the tax law as enacted. This is reinforced by the ATO's "Justified Trust" framework, which focuses on "objective evidence that would lead a reasonable person to conclude a particular taxpayer paid the right amount of tax" (https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/justified-trust). The "right amount of tax" is an amount without regard to probability of an ATO review. Making the payment of incremental tax effectively optional by reference to administrative discretion is

inconsistent with sound governance and sets an undesirable precedent. Tax agents are required to lodge tax returns in accordance with the law, rather than by reference to the likelihood of ATO compliance activity.

More broadly, retrospective changes to the law are inconsistent with principles of sound governance and may give rise to unjust and inequitable outcomes. In this regard:

- In attracting foreign investment, foreign investors seek to invest in jurisdictions with stable governance. One measure of stable governance is not making retrospective changes to the law (or where such retrospective changes are unavoidable, that appropriate grandfathering is provided so that the investment metrics do not change part way through a long term investment as a result of tax changes).
- The prices foreign investors pay for infrastructure assets or the prices charged by infrastructure businesses owned by foreign investors factor in any expected Australian CGT outcomes on exit. Retrospective changes distort these pricing assumptions after the fact.
- A large portion of foreign investors to which the retrospective changes may apply would not have lodged Australian income returns, but those that did would be advantaged over those that did not by virtue of the four-year statutory amendment period rule. In raising this point we are not advocating that the Government should amend the law to create an exception to the four-year statutory amendment period, quite the contrary. Rather, this point highlights the inequities created by retrospectivity.
- Foreign taxpayers in a treaty jurisdiction may obtain a more favourable outcome under the retrospective changes than foreign taxpayers not in a treaty jurisdiction, noting that the treaty related amendments in the Exposure Draft are only prospective. This may mean that different tax outcomes could arise for foreign investors, depending on whether they are resident of a treaty country (in which case the rules could apply prospectively only) or a non-treaty country (in which case the domestic laws apply including the retrospective amendment). This would lead to, for example, different positions for consortium investors who divest of a greater than 10 percent interest in the same asset. Again, we are not advocating for the treaty related amendments to be made retrospective.
- There is likely to be impacts to financial statements where this measure is substantively enacted, given accounting rules relating to uncertain tax positions (e.g. FIN 48 or IFRIC 23). Foreign companies may have also made disclosures in earlier financial statements as to the Australian taxation implications of divestments, which may need to be amended.
- Some taxpayers have commenced proceedings or obtained judicial determinations based on the existing law. Retrospective amendments may require those matters to be reconsidered by those Courts, giving rise to additional time and cost for the parties involved.
- It can often be difficult to access information to undertake TARP calculations. Revisiting TARP calculations going back 20 years will be very difficult, if not impossible. The law currently puts the burden of proof on not satisfying the principal asset test on taxpayers where often they have sold the entities concerned. This will further exacerbate the difficulty caused by the burden of proof.
- Where an Australian unit trust fund has between 2006 and the present time realised a capital gain on assets that under current law are not real property and are subsequently are real property under these changes, it would not have withheld the correct taxes (MIT withholding or for s97 ITAA36 trustee assessments) from foreign resident unitholders. Where such foreign unitholders no longer have an investment in the fund, that capital gains tax will be paid by the trust and shared by all current investors, even Australian resident investors, with no entitlement to tax credits.

- Good governance requires, if there is retrospective legislation which bring assets into the tax net that were not previously in the tax net or changes the taxation of such assets, that there is appropriate grandfathering. For example, the CGT rules contain a regime around 'pre-CGT assets', and when the 50 per cent CGT discount was removed for non-residents and temporary residents, the legislation included a transitional choice to treat the asset as if it were acquired at its market value on 8 May 2012 for the purpose of working out the part of the gain eligible for the 50 per cent CGT discount. No comparable relief is proposed here, at odds with sound governance.
- Over the last 20 years there would be many instances where foreign resident taxpayers and the Commissioner of Taxation have entered into Settlement Deeds relating to Division 855, with varying basis upon which the settlement is represented. The 'Short model deed' and the 'Full model deed' on the ATO websites do not expressly address what the impact of a retrospective change in the meaning of real property would mean for the settlement and for those deeds which do not expressly provide that the deed is not impacted by a change in law there is therefore a question as to whether the proposed retrospective change in the law could potentially enable the Commissioner of Taxation to re-open those prior settlements where the relevant assessment / amended assessment was issued within the last four years. There are similar considerations for review and audit outcomes.
- From a revenue perspective, there will be significant hurdles and practical challenges for the ATO in collecting tax particularly for historical transactions and where the foreign resident no longer has investments in Australia or a presence in Australia.

Alternative approach

In light of the above, the Tax Policy Taskforce submits that it considers the retrospective amendments to be inappropriate, and should not be proceeded with.

If this is not accepted, any retrospectivity should be expressly limited in legislation to the principle of statutory severance and a strictly defined period (at most the four-year period from the date of enactment). This is consistent with the ATO's proposed administrative approach but provides the necessary level of certainty and protection rather than reliance on non-binding administrative discretion.

3. Proposed expansion goes beyond treaty / OECD approach to real property

The draft legislation includes a proposed amendment to the *International Agreements Act 1953*. The intention appears to be that this amendment is made on a prospective basis only (per Item 20(20) of the ED, and we would like to seek clarity on whether the reference to Item 37 in the Explanatory Materials at paragraph 1.94 should instead reference Item 36.

It is not clear whether this is an intentional design feature of the draft legislation. We note there have been examples of changes to this act made on a retrospective basis (e.g. the Treasury Laws Amendment (Foreign Investment) Act 2024 which inserted section 5(3) for tax period from 2018). However, in this situation there may be challenges associated with revisiting prior positions where a treaty is in force and provides taxation relief. As such, there should be clarification as to whether the retrospective change to the real property definition applies to residents of treaty countries.

We refer to paragraph 596-597 in the Newmont Decision, which we reproduce below:

> [596] As to the OECD practice, at the time there was an OECD model convention for tax treaties. The position of the Commissioner was that many of Australia's treaties had been based on the convention, with variations. The model convention included the following article:
>
> > The term 'immovable property' shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.
>
> [597] For present purposes, it is significant that the model convention provision deployed the concept of 'immovable property' and sought to deploy that term and related concepts according to the meaning they bore under the law of the State in which the immovable property was 'situated'. The terms of the convention provide no support for the Commissioner's contention that the term 'real property' (being the common law conception of immovable property) was used according to some form of ordinary meaning. On the contrary, it supports an intention to deploy the legal meaning.

It follows from paragraph [595] of the *Newmont Decision* that real property is the common law conception of immovable property, and any statutory expansion of the term real property shall not constitute immovable property for the purpose of a treaty unless that treaty incorporates a similar expansion.

The proposed amendment in Exposure Draft to subsection 3(5) of the *International Agreements Act 1953* contained in item 36 of the Exposure Draft, which amends the subjection from:

> 3(5) To the extent that an agreement provides that the expression *immovable property* has the meaning it has under the law of Australia, that expression, for the purposes of that agreement, includes *real property*.
>
> to:
>
> 3(5) 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, for the purposes of that agreement, that expression means *taxable Australian real property* within the meaning of the *Income Tax Assessment Act 1997*.

suggests that at least in the case of the prospective definition of *real property* is broader than the common law meaning of *real property* for Australian general law purposes.

It is also noted that the amendment to subsection 3(5) refers to *taxable Australian real property* within the meaning of the *Income Tax Assessment Act* 1997, rather than just *real property*. The key difference between *real property* and the proposed prospective definition of *taxable Australian real property* is that the latter is narrower (and not wider) than the definition of *real property*, other than for the existing inclusion of paragraph 820-20(b) which expands the term *taxable Australian real property* to include mining, quarrying or prospecting rights in Australia to the extent those rights are not otherwise *real property*. Presumably, the purpose of

referencing *taxable Australian real property* within the meaning of the *Income Tax Assessment Act 1997*, rather than just *real property*, is to reference a tax-specific definition so that there can be no confusion that the treaties should reference the general law meaning of *real* property, and to ensure that treaty protection can't be claimed over assets falling within paragraph 855-20(b).

Further, we do not consider that the proposed changes to Division 855 are aligned with the OECD approach. The OECD Model Commentary states "*Paragraph 1 gives the right to tax income from immovable property to the State of source, that is, the State in which the property producing such income is situated. This is due to the fact that there is always a very close economic connection between the source of this income and the State of source*." This merely explains the basis of why the source state has taxing rights over immovable property. It does not define immovable property using a close economic test, and hence the comments articulated in the Explanatory Materials at paragraph 1.18 that capturing assets with a close economic connection is consistent with OECD principles is incorrect.

4. Breadth of prospective expansion

The proposed scope of the new definition of real property as well as the expansion of paragraph 855-20(a) represents a significant broadening of the foreign resident CGT base, going beyond commonly understood concepts of real property and materially expanding the types of assets, interests and rights that may now fall within scope.

The Tax Policy Taskforce submits that several of the inclusions are overly wide and/or vague and should be clarified. In some instances, there is a limitation provided in the EM, but this is not reflected in the current drafting of the legislation and should be. In other instances the Explanatory Materials would benefit from further guidance including examples. In this regard:

- A licence or contractual right exercisable over or in relation to land:
  - The Explanatory Materials states that "*Most commonly, licences that relate to land in a manner similar to leases are within scope of the meaning of real property for the purposes of the tax*." This is a material narrowing of the test and should be expressly incorporated into the drafting of the real property definition. Absent such limitation, the drafting is capable of capturing a wide range of contractual rights that have only a remote or incidental connection to land, which we assume is an unintended consequence.
  - The same applies to the qualification in the Explanatory Materials at paragraph 1.36 that states that the meaning of real property is not intended to capture an entity's licence to access premises that are ancillary to the performance of services on-site. This should be further explained in both the drafting of the legislation and the Explanatory Materials. It is particularly important so there is clarity as to the treatment of PPP arrangements and offtake arrangements, as discussed further below.

- Things fixed or installed on land:
  - The Explanatory Material seeks to distinguish between a thing being "placed onto" land (not installed) and being placed "in position for use" on land (i.e. considered to be installed). It is difficult to envisage what the practical distinction between these tests is, particularly for infrastructure and energy assets

that may be modular, relocatable, or capable of replacement over time. The Tax Policy Taskforce submits the Explanatory Materials should be updated to provide further guidance, including examples to explain how this distinction is intended to operate and how it should be applied in common commercial scenarios.

5. Clarification of the treatment of PPP arrangements and other arrangements for the provision of goods and services

The Tax Policy Taskforce respectfully submits the scope of "a licence or contractual right exercisable over or in relation to land" is overly broad and must be clarified in the exposure draft to more clearly exclude contractual rights for the provision of goods and services such as occur in PPP arrangements for public infrastructure and offtake arrangements common within the infrastructure sector.

We understand that expanded definition of real property "is not intended to capture an entity's licence to access premises that are [sic] ancillary to the performances of services on-site" (paragraph 1.36 of the exposure draft EM). However, as outlined below the Explanatory Materials, clarification cannot be relied on and does not fully address the potential overreach of the proposed definition in the context of PPP and offtake arrangements.

To provide sufficient certainty, we submit that the definition of real property in the Exposure Draft should include an express qualification along the following lines:

> "*For the purposes of subsection c) above, a licence or contractual right will not be considered exercisable over or in relation to land merely because it relates to goods produced or services provided in respect of that land, or because it provides access to land that is ancillary to the provision of those goods or services*."

Submissions in support of this amendment by reference to PPP and offtake arrangements are set out below.

6. PPP arrangements for public infrastructure

PPPs structured as a securitised licence arrangement using an 'availability payment' mechanism are commonly used by state and territory governments to procure privately-financed public infrastructure, such as schools, social and affordable housing, hospitals, prisons, sporting arenas, entertainment precincts, certain public transport infrastructure and other public infrastructure assets.

Key elements of these structures include a:

(a) Project Deed between government and the proponent under which:
   i. The proponent agrees to design and construct the public infrastructure in consideration of a fixed price construction fee ("D&C services"); and
   ii. The proponent agrees to provide operations and/or maintenance ("O&M") services in respect of the asset in consideration of an ongoing "availability fee" which is subject to abatement for any failure to perform.

(b) Licence Agreement between government and the proponent under which:
   i. The proponent obtains access to the site for the purpose of providing the O&M services under the Project Deed
   ii. The proponent pays a licence fee over the O&M Phase

(c) Securitisation Agreement between the government and a special purpose financing vehicle (SPV) under which:

i. During the construction phase, the SPV acquires the future licence fee cash flows in consideration of instalments paid to the government (which funds the government's construction milestone payments).

The ATO is familiar with these structures and has provided public guidance regarding their relevant tax implications on their website. Taxation of PPPs for social infrastructure projects | Australian Taxation Office

In essence, for current purposes, these arrangements involve the proponent providing D&C services for a fixed construction fee over the D&C Phase and O&M services over an O&M phase for a fixed availability fee (subject to abatement). The Licence Agreement merely provides the proponent access to the site for the performance of those services and does not convey or provide any proprietary interest in the land nor the constructed assets.

Following completion of the relatively high-risk development phase it is not uncommon for investors in the consortium to sell down their interests to long term investors. To the extent that any gain is made by exiting investors on sell down it would relate to the forecast operating margin that can be made by the proponent through the provision of ongoing services over the fixed availability service fee paid by the government, rather than any value attributable to the underlying infrastructure assets owned by the government.

Accordingly, although the contractual rights and obligations under the Project Deed and the Licence Agreement may be considered connected to the site, it is submitted that the economic value of those assets is based on the value of the service payments rather than the underlying infrastructure assets.

In this context, we would expect that the expanded definition of real property is not intended to capture either the Licence Agreement or the contractual rights arising under the Project Deed. This is on the basis that the rights relate solely to the provision of services to government under the Project Deed and access rights under the Licence Agreement that merely facilitate the provision of those services.

However, the breadth of the terms "contractual rights", "exercisable over" and "in relation to land" creates a real risk of overreach in the context of these arrangements.

For example, a Project Deed that relates to the provision of D&C and O&M services for a metro trainline could, on a literal reading, be characterised as a "contractual right" exercisable "over or in relation to" the trainline assets, even though the proponent has no proprietary interest in those assets.

Accordingly, our above submitted clarification to the definition of real property is required to ensure that these arrangements are not inadvertently brought within the scope of taxable Australian real property, which would be contrary to the evident policy intent.

7. Clarification of treatment of offtake arrangements/concessions

Consistent with our submissions above regarding PPP services arrangement, offtake arrangements/concessions within infrastructure projects relate to the provision of goods or services to customers using infrastructure assets owned, leased or otherwise accessed by proponent.

While ownership interests or access rights over the infrastructure assets may properly fall within the proposed real property definition, there is a risk that the proposed definition could conceivably be interpreted to include the offtake agreement/concession itself – notwithstanding that the offtake agreement/concession merely relates to the provision of goods or services.

This potential impact may be illustrated using the example of a stapled structure which typically comprises the following:

- PropCo: being an SPV that holds a head lease of the project land on which the relevant infrastructure assets are located;
- OpCo: being an SPV that is granted a sublease over the project land for the purpose of operating the assets; and
- Offtake agreement/Concession: under which the OpCo receives service fees for the provision of goods or services using the subleased assets.

The OpCo pays periodic arm's length rentals under the sublease for access to the infrastructure assets to meet service obligations under the offtake agreement/concession.

In this context, the contractual rights held by the OpCo (being the rights under the sublease and the offtake agreement) relate solely to the provision of goods or services and access to infrastructure assets that can be operated to provide those goods and services.

On the basis that the sublease is on arm's length terms, any gain made from the sale of interests in the OpCo or the underlying offtake agreement would be attributable to the forecast operating margin that can be made from the provision of goods or services under those arrangements rather than any value in the relevant infrastructure assets themselves.

Nonetheless, consistent with our submissions above in respect of PPP arrangements, given the offtake arrangement/concession would explicitly or implicitly contemplate the use of specific infrastructure assets in the provision of goods or services it is conceivable that those contractual rights could be characterised as "exercisable over" or are "in relation to" those land or land-based assets, based on a literal reading of the proposed definition.

Again, it is understood that the Government does not intend arrangements for the provision of goods or services in the form of offtake arrangements/concessions to be captured within the expanded prospective definition of real property. Therefore, to give effect to that intention and to provide certainty to taxpayers, we submit that the above clarifying amendment to paragraph c) of the proposed definition of real property should be included in the final bill.

8. CGT discount should be broadened to include a wider class of renewables

The Tax Policy Taskforce supports in principle the Government's introduction of a 50 per cent CGT discount as a form of transitional relief to support investment in the Australian renewables sector. To achieve the Government's stated policy intent of assisting foreign investors in renewable energy assets, including those that contribute to the growth of Australia's renewable energy sector, we recommend the scope of the concession be expanded and refined in the following respects.

Restrictive focus on generation assets

The draft legislation requires an "Australian renewable energy asset" to have "the primary purpose of generating, or directly facilitating the generation of, electricity in Australia using an eligible renewable energy source" (within the meaning of *Renewable Energy (Electricity) Act 2000*). The Tax Policy Taskforce puts forward

that this formulation is unduly restrictive and excludes a range of assets and investors that are critical to Australia's renewable energy transition.

Australia's transition to net zero depends not only on direct generation assets such as wind turbines and solar panels but also on the wider ecosystem of infrastructure that enables and supports the renewable energy transition. For example, battery energy storage systems, transmission lines, substations and general transmission infrastructure (i.e. poles and wires) are essential components of a functioning clean energy grid. However, these assets may not be used primarily or predominantly for generating, or directly facilitating the generation of, electricity and would therefore fall outside the proposed definition. We recommend the generation focused requirement be removed and replaced with a concept that captures assets which are connected to, designed to operate with, or facilitate the storage or transference of energy from, renewable energy assets. Government will need to closely consider the inclusion of gas generation given its role as an enabler of deeper renewable penetration.

An unduly restrictive definition of an "Australian renewable energy asset" would also lead to practical difficulties for taxpayers and may lead to complex disputes with the ATO. This uncertainty can detract from investment decisions. Artificially bifurcating between assets that generate, or directly facilitate the generation of, renewable energy as against other forms of assets used in or for renewable energy projects will require the attribution of market value across individual assets that are held and designed to operate holistically. This not only increases investor uncertainty and the risk that capital is not deployed on a whole of network basis, but also taxpayers' compliance costs and disputes with the ATO.

A practical example of this can already be seen within the draft Explanatory Material itself, which considers that land on which a renewable asset is approved for construction, and an intragroup loan, may each constitute an "Australian renewable energy asset" while "general electricity transmission infrastructure (i.e. poles and wires)" would not qualify. The transmission (including distribution) grids, poles and wires are a fundamental part of the investment needed to transfer the energy from solar farms/wind farms/BESS to Australian homes. Without the transference infrastructure, the energy from solar farms/wind farms/BESS has no value to Australians. The transference infrastructure is an integral part of the renewable energy production that needs significant and continued investment support over the next few decades and should not be excluded from transitional relief.

Broader examples beyond transmission infrastructure also exist. For example, a synchronous condenser may be required for individual renewable projects to stabilise energy generated. However, this may not directly generate, or facilitate the generation of, renewable energy.

The practical operation of the proposed "primary purpose test" is also unclear. The draft Explanatory Materials considers an asset which "predominantly" generates, or facilitates the generation of, renewable energy will meet this requirement. A purpose analysis may be broad and complex. If the Government's policy is to target the concession to assets that predominantly relate to renewable energy, then it may be preferable to explicitly require "predominant" use or future use within the legislation itself rather than introduce a new purpose analysis. This would improve certainty for both taxpayers and the ATO.

Restrictive bright line test for indirect disposals

For indirect disposals, the draft legislation requires that 90 per cent or more of the underlying value of the entity's TARP assets is attributable to Australian renewable energy assets. This threshold is also unduly restrictive and may be easily breached in circumstances that are inconsistent with the Government's policy intent and which should qualify for transitional relief. For example, and as discussed above, the inclusion of assets that do not predominantly relate to generating renewable electricity may easily disentitle a taxpayer from transitional relief. This outcome undermines the effectiveness of the concession and discourages integrated investment structures.

Early sunset of the transitional relief

The transitional relief is proposed to be limited to CGT events occurring from commencement until 30 June 2030. This will be, at most, a four- year period. This limited timeframe is inconsistent with the apparent Government policy intent and the guidance in the explanatory material. For example, the draft guidance:

- provides the transitional relief is intended to support investment into the Australian renewables sector as part of the energy transition and to enable investors to price CGT into their investment models; and
- includes multiple examples of relevant assets that may achieve transitional relief, being land with a development approval, assets not yet under construction, partly constructed assets and pre-development assets.

In practice, depending on the size and type of a renewable energy project, a typical timeframe for renewable projects can include:

- one to three years to secure suitable sites, obtain approvals and reach financial close;
- a further two to three years for construction; and
- a subsequent holding period of three to five years for assets to be demonstrably held on capital account, consistent with the ATO's expectations (that is, before Division 855 can even apply) and orderly sales process undertaken once asset operating data is available.

Many renewables projects can take significantly longer than this; active development for some projects may take seven years to reach financial close, with another six years then required to construct the asset and complete warranty works.

The guidance indicates that renewable assets and projects that are yet to be acquired or are newly acquired are intended to be able to qualify for transitional relief.

A four-year period would exclude most of these assets from transitional relief, despite being precisely the types of investments the concession is intended to encourage. Further, modelling from the Australian Energy Market Operator suggests that around 90 per cent of Australia's coal-fired generation today is expected to be retired by 2035. Over the next 10 years, a significant transition in energy generation from fossil fuels to clean,

renewable energy is required to achieve the 2035 target of a 62-70 per cent reduction of greenhouse gas emissions below 2005 levels and net zero by 2050.

We therefore consider a more appropriate transitional period would be to 2040, to ensure that the discount has any meaningful impact on encouraging foreign investors to invest in new renewable energy projects.