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cc:
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24 April 2026

Dear Marty,

Strengthening the foreign resident capital gains tax regime – draft legislation

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 176,000 members in over 100 countries and regions. We make this submission in response to Treasury's draft legislation: **Strengthening the foreign resident capital gains tax regime – draft legislation** on behalf of our members and in the broader public interest.

CPA Australia raises serious concerns regarding the exposure draft legislation released on 10 April 2026 on the foreign resident capital gains tax (CGT) regime. We understand from discussions with Treasury that the measures are intended to protect the perceived revenue risk arising from recent Federal Court decisions, and to ensure the CGT base is consistent irrespective of State and Territory severance rules. However, the draft legislation as currently framed would retrospectively reopen transactions dating back nearly two decades and broaden the CGT base in ways that go beyond a narrow clarification.

In summary, CPA Australia's key concerns and recommendations are:

- **Proposals should only operate prospectively**: The appropriate legislative response to the acknowledged uncertainty in the operation of Division 855 is to amend the law on a prospective basis - not to retrospectively re-characterise settled transactions in a way that exposes taxpayers to liabilities they could not reasonably have anticipated or mitigated.

- **Retrospectivity must be narrowed:** Retrospective provisions should be repealed and replaced with a commencement date of 1 July 2025, consistent with the Government's own prior announcement.

  If the Government proceeds with any retrospective application, it must be narrowly targeted and supported by clear statutory safeguards. Any retrospectivity should be limited to no more than four years prior to commencement and confined to arrangements only where a State or Territory statutory severance provision applied, consistent with the stated policy intent in the EM.

  The legislation should also prevent retrospective refund claims due to the application of statutory severance, restrict the Commissioner from issuing new historical assessments unless compliance activity had already commenced prior to enactment, and preserve the finality of settled matters and disputes already on foot. This approach would provide legislative certainty, prevent unintended refund outcomes, and allow the ATO a targeted, time-bound opportunity to address genuinely at-risk cases without creating open-ended historical exposure or undermining confidence in Australia's tax system.

- **Prospective "real property" definition needs clear boundaries:** given the intended broader, go-forward definition, the law and examples should clearly delineate what land-connected rights and assets are in

scope (including any intended land-connected intangibles) and what is not (including service-provider access rights, financing/security arrangements, and ordinary commercial contracts such as offtake agreements). There should be explicit statutory exclusions for service access rights and financing/security interests to prevent unintended CGT outcomes.

Retrospective tax changes of this scale fundamentally undermine the stability and predictability required for investor confidence, particularly where investors relied on long-established interpretations of fixtures/chattels and the interaction with State and Territory property rules. We understand from discussions with Treasury that the changes are not intended to trigger a broad "retrospective compliance hunt"; however, that intent should be embedded in the operative law through appropriately narrow drafting and clear transitional protections.

In addition, CPA Australia submits that two weeks is inadequate for reforms of this magnitude and urges an extended consultation period so that the drafting can be narrowed and clarified before enactment.

Detailed Comments

A. Retrospectivity – must be narrowed

Definition of "real property"

The draft legislation proposes to retrospectively enlarge the foreign resident CGT base through an expanded inclusive definition of "real property" for the purposes of Division 855 of the ITAA 1997, with effect from 12 December 2006. While the Explanatory Memorandum (EM) characterises this as "clarifying" the meaning of real property, the retrospective definition as drafted is materially broader than what is necessary to address the specific targeted issue - namely, ensuring consistent CGT outcomes where assets would be fixtures at general law *but for* the operation of State and Territory severance provisions. CPA Australia submits that, if any retrospectivity is maintained, the retrospective limb should be narrowly targeted to that policy problem and should not extend to broad categories of contractual rights, or other arrangements that go beyond a fixtures/severance alignment.

The EM acknowledges uncertainty and inconsistent treatment under the existing rules. Where the law has been uncertain and inconsistently applied, foreign investors have formed and acted on reasonably arguable positions in good faith. Retrospectively applying a materially expanded definition, as currently drafted, risks reopening settled transactions and imposing liabilities and penalties on the basis of concepts that did not exist at the time of the relevant CGT event. This is especially concerning given the current draft definition extends well beyond the specific severance/fixtures issue and therefore increases sovereign risk for offshore capital.

The retrospective application of the amended definition of real property also warrants scrutiny under Senate Standing Order 24, which establishes the Standing Committee for the Scrutiny of Bills and requires it to examine whether bills, by express words or otherwise, trespass unduly on personal rights and liberties. We submit that retrospectively exposing taxpayers to CGT liability - on transactions completed in good faith under the law as it stood at the time - constitutes precisely the kind of undue trespass on personal rights and liberties that Standing Order 24 is designed to bring to the Senate's attention.

The proposed retrospectivity is inconsistent with the 2025–26 Federal Budget announcement that the start date for the measure would be deferred from 1 July 2025 to the later of 1 October 2025 or the first 1 January, 1 April, 1 July or 1 October after the Act receives Royal Assent. If the policy intent is to defer commencement, that intent should be reflected in the draft legislation, rather than introducing a broad retrospective expansion back to 2006.

If the draft legislation is enacted as is, many foreign investors may now face ATO assessments with no "period of review" limitations, potentially exposing them to unexpected liabilities and penalties decades later.

Retrospective date

The proper legislative response to the acknowledged uncertainty in the operation of Division 855 is a prospective amendment, not a retrospective re-characterisation of settled transactions that exposes taxpayers to liabilities they had no reasonable means of anticipating or avoiding.

CPA Australia submits that if any retrospective operation is to be retained at all, the commencement date should be 1 July 2025, the date on which the Government originally announced these measures would take effect following

the 2024–25 Budget. That announcement put the market on notice that the foreign resident CGT base would be expanded from that date. Any argument that taxpayers were on constructive notice of these changes cannot be sustained for any period before that announcement.

The 2006 start date is not anchored to any public announcement, policy statement, or even a clear revenue concern arising from that period. The EM's characterisation of the changes as a "clarification" of the law since 2006 is, as submitted in Section A above, not supportable — the Federal Court decisions that prompted this legislation demonstrate precisely that the law was not clear and that courts have reached conclusions inconsistent with the Commissioner's view. A "clarification" that is contradicted by binding judicial authority is not a clarification; it is a legislative override dressed as one.

The May 2024 Budget announcement and the ATO's four-year administrative concession are not adequate substitutes for a proper prospective commencement date. The May 2024 announcement did not put taxpayers on notice that transactions completed as long ago as 2006 would be retrospectively caught; it announced a forthcoming prospective change. The ATO's four-year practice is administrative only, as addressed in Section B. Neither provides the certainty that only a legislative prospective start date can deliver.

CPA Australia therefore submits that the retrospective provisions should be repealed and replaced with a commencement date of 1 July 2025, consistent with the Government's own prior announcement.

Recommendation 1

Confine any retrospective operation to the narrow fixtures/State severance issue (and not broader licences/contractual rights).

Retrospective provisions should be repealed and replaced with a commencement date of 1 July 2025, consistent with the Government's own prior announcement.

B. Alternative approach to retrospectivity

We note the ATO has recently outlined an intended administrative approach to the proposed rules, indicating it would continue its current compliance practice for disposals that are under review or have occurred within the past four years. The ATO has also stated that, as a general practice, it would not seek to review older disposals, even where the statutory amendment period remains open, subject to limited exceptions.

While this guidance is noted, it does not provide an adequate safeguard for taxpayers. It reflects an administrative position only, which can be withdrawn, amended, or applied inconsistently over time. It does not bind the Commissioner in a legal sense, nor does it provide enforceable protection for taxpayers.

Importantly, once enacted, the ATO will be required to administer the law as legislated, including its retrospective elements. In that context, reliance on administrative practice in place of clear statutory limits is inappropriate. Taxpayers should not be asked to depend on administrative discretion to achieve certainty where the law itself creates exposure.

This reinforces the need for explicit legislative constraints on the retrospective application of the measure. A statutory limit is necessary to provide certainty, protect taxpayer rights, and ensure that the scope of the law is clear and predictable, rather than contingent on administrative practice.

We understand from a discussion with Treasury that the measures are aimed at preventing State and Territory severance provisions from producing different CGT outcomes for substantively similar land-based assets depending on jurisdiction. CPA Australia understands these concerns; however, retrospectively changing the CGT base for foreign residents to 2006 remains disproportionate, and risks undermining Australia’s reputation for stable tax settings.

Recommendation 2

If Government maintains some form of retrospectivity, and bearing in mind the need to appropriately balance Treasury's objectives with the need for finality, the legislation should:

1. **Limit retrospective application to a defined period**
   Confine any retrospectivity to no more than four years prior to commencement, and only in respect of arrangements involving State or Territory statutory severance provisions (consistent with paragraph 1.84 and 1.85 of the EM) that resulted in assets not being treated as real property under the existing law (rather than the broader concepts currently proposed).

   Deny retrospective refund outcomes
   Prevent taxpayers from amending prior assessments to obtain reduced tax liabilities under Division 855 in respect of historical transactions due to the application of the statutory severance provisions.

2. **Constrain the Commissioner's ability to issue new assessments**
   Prohibit the Commissioner from issuing assessments for any retrospective or earlier period unless the taxpayer had been formally notified, prior to enactment, that they were subject to compliance activity or examination in relation to Division 855.

3. **Preserve finality of settled and ongoing matters**
   Include an explicit statutory rule that retrospective amendments cannot be used to reopen or disturb:

   - matters that have been finally resolved (including settlements, binding rulings, or completed reviews), or
   - disputes on foot at the date of enactment (including objections and court proceedings).

This approach would provide legislative certainty on the limits of retrospective application, prevent unintended refund claims, and allow the ATO a targeted and time-bound opportunity to address genuinely at-risk cases, without exposing taxpayers to open-ended historical risk or undermining the finality of concluded matters.

C. Prospective definition of "real property" – the need for clear boundaries

CPA Australia understands Treasury's intention to modernise and broaden the meaning of "real property" on a prospective basis so the CGT net appropriately captures land-based infrastructure and assets treated as severed under State/Territory law. However, because the prospective definition is significantly wider than the general law concept of real property, the legislation needs clearer boundaries so taxpayers can confidently determine what is (and is not) taxable Australian real property (TARP). In particular, the definition should be drafted so that only land-connected interests and assets of the kind intended are captured, without inadvertently drawing in ordinary commercial contracts, access rights ancillary to services, or financing/security arrangements.

We understand that the measures are intended to capture assets that would be fixtures "but for" State/Territory severance laws, and also certain intangibles that are inherently connected to land (for example, water entitlements and certain land-based licences).

Greater clarity is required in relation to licences and rights of access to land. While paragraph 1.36 of the EM indicates that the measure is not intended to capture a service provider's right to access land that are ancillary to the performance of services on-site, this limitation is not reflected in the legislative drafting. As currently framed, the breadth of the definition creates a real risk that ordinary commercial arrangements, such as access rights granted to contractors, operators, or service providers, could be inadvertently characterised as interests in real property.

To address this, CPA Australia submits that the legislation should include an express statutory exclusion confirming that licences or rights which merely permit access to land for the purpose of providing services, and which do not confer any proprietary or enduring interest in the land itself, are not "real property" for the purposes of Division 855. This would ensure alignment between the policy intent and the operative law, and avoid unintended consequences for routine commercial and infrastructure arrangements.

The expanded definition of "real property" should also expressly exclude mortgages, charges, and other security

interests over Australian land and infrastructure assets. A mortgage or fixed charge over real property gives the mortgagee a proprietary interest in the land for the purposes of general property law; on a plain reading of an expansive definition of "real property," it is arguable that a foreign lender holding a mortgage over Australian land or land-connected infrastructure holds a "real property" interest for Division 855 purposes.

If that reading were correct, the disposal of a mortgage or secured loan, including through secondary market transactions, loan book sales, securitisations, or enforcement, could constitute a taxable event under the foreign resident CGT regime. This would have profound and unintended consequences for Australia's debt capital markets, cross-border project finance, and infrastructure lending, sectors in which foreign capital plays an indispensable role. It would also expose foreign financial institutions to CGT liability on the realisation of security interests in circumstances wholly unrelated to the policy concern that the legislation is designed to address.

CPA Australia supports clarity on these intended inclusions; however, the current drafting leaves material ambiguity for common infrastructure transaction “bundles of rights” (including offtake arrangements and other commercial contracts).

Recommendation 3

We recommend the legislation (and EM examples) expressly delineate (a) land rights and land-connected statutory licences that are in scope, versus (b) ordinary commercial agreements that merely relate to land-based operations but should not be treated as “real property”.

If the definition of “real property” is to be broadened prospectively, provide clear statutory boundaries and examples - confirming intended inclusions (e.g., fixtures-but-for-severance; certain land-connected statutory rights) and expressly excluding ancillary service-access arrangements, ordinary commercial contracts (e.g., offtake), and financing/security interests.

CPA Australia submits that the legislation should include an express statutory exclusion confirming that licences or rights which merely permit access to land for the purpose of providing services, and which do not confer any proprietary or enduring interest in the land itself, are not “real property” for the purposes of Division 855. This would ensure alignment between the policy intent and the operative law, and avoid unintended consequences for routine commercial and infrastructure arrangements

We also submit that the legislation should include an express exclusion confirming that security interests in Australian real property, including mortgages, charges, pledges, and analogous arrangements, do not constitute "real property" for Division 855 purposes, and that the realisation or enforcement of such interests does not give rise to a taxable CGT event under the expanded definition.

We also address other issues in Appendix A to this submission.

Conclusion

CPA Australia is committed to engaging constructively with Treasury on any redrafting of the legislation, and welcomes Treasury’s clarification that the changes are not intended as a broad retrospective compliance hunt.

However, tax integrity depends on trust, certainty, and fairness, and these are put at risk where the operative text permits very wide retrospective exposure and unclear boundaries for what constitutes “real property”, and where transaction administration settings create avoidable deal friction.

For the reasons set out in sections A–C, we recommend that Government reconsider the retrospective application of these rules (or, at minimum, legislate clear transitional protections and reasonable limits to support finality), and clarify the prospective scope of “real property”.

If you have any queries, please contact Jenny Wong, Tax Policy Lead on jenny.wong@cpaaustralia.com.au.

Yours sincerely,

Jenny Wong
Tax Policy Lead

Appendix A

Practical issues with retrospective collection

The retrospective application of the expanded CGT base raises not only legal concerns but fundamental practical ones that Treasury appears not to have addressed in the EM. CPA Australia draws attention to three categories of taxpayer for whom retrospective liability is not merely inconvenient but structurally irrecoverable.

Distributed gains. Many foreign resident entities that disposed of Australian assets between 2006 and the present will have distributed the proceeds of those disposals to their own investors — who are themselves non-residents. The disposing entity will have no retained funds from which to meet a retrospective CGT assessment. The Commissioner would be seeking to recover tax from an entity that has no Australian assets, no Australian presence, and no funds from which a historic tax liability could be discharged. The legislation should acknowledge this practical reality and exclude from retrospective assessment any disposal where the proceeds have been fully distributed to non-resident investors and no Australian nexus remains.

Wound-up and liquidated entities. A significant number of entities that completed disposals in the period from 2006 onwards will have since been wound up, liquidated, or deregistered — including foreign trusts that have vested and distributed, and foreign companies that have been struck off or dissolved in their home jurisdiction. Such entities cannot be resurrected to respond to an ATO assessment, cannot lodge objections, and cannot be subject to meaningful enforcement. Retrospective liability against entities of this kind is not a revenue measure — it is an unenforceable impost that serves no purpose other than to create uncertainty and compliance cost for professional advisers attempting to manage the estates of wound-up structures. These entities should be expressly excluded from the retrospective provisions.

Return-lodgers versus non-lodgers. An indefensible dichotomy arises between foreign residents who lodged an Australian tax return disclosing their disposal (and may have taken a position that the asset was not TARP) and those who did not lodge at all. Under standard limitation period principles, the four-year amendment period runs from the date of lodgment for the former group, meaning the Commissioner's window to amend those assessments may already be closed for disposals occurring before April 2022. However, for non-lodgers — who may have reasonably considered they had no Australian tax obligations — no clock has run, and the Commissioner's ability to raise an original assessment is theoretically unlimited. This produces the perverse outcome that a taxpayer who engaged with the Australian tax system in good faith by lodging a return is better protected than one who did not lodge because they genuinely believed (correctly, on then-prevailing law) that no lodgment was required. This inequity reinforces the case for a uniform statutory four-year cap applicable regardless of whether a return was lodged.

Director and trustee liability. CPA Australia also raises the issue of personal liability exposure for directors of corporate trustees and directors of foreign companies that failed to withhold PAYG amounts on distributions connected to the now-retrospectively-caught disposals. Where the entity itself cannot satisfy a retrospective assessment — because it has been wound up, has no assets, or has distributed its funds — the Commissioner may seek to pursue directors personally under the director penalty notice regime. This would impose extraordinary personal liability on individuals who acted entirely in accordance with the law as it was understood at the time, and who had no basis on which to form the view that withholding obligations applied. The legislation must include a clear safe harbour precluding personal liability under the director penalty regime for any failure to withhold that arose from a disposal occurring before the date of enactment and that was treated, at the time, as falling outside the Australian CGT base.

Inconsistency with capital allowances framework

The prospective definition of "real property" as drafted creates a structural inconsistency within the income tax law that has not been addressed in the EM. Under Division 40 of the ITAA 1997, assets that are "plant", including much of the infrastructure now proposed to be treated as real property for Division 855 purposes — are depreciable assets. Division 43 separately provides for capital works deductions in respect of structural

improvements and construction expenditure on buildings and structures fixed to land. The boundary between Division 40 plant and Division 43 capital works is well-established in the case law and ATO guidance and provides a principled, existing delineation between what constitutes a structural improvement to land and what constitutes removable or separately-identifiable plant.

The draft definition of "real property" does not align with this existing framework. It is entirely possible, under the draft legislation, for an asset to be depreciable plant for Division 40 purposes — meaning the law treats it as a separate, depreciable asset distinct from the land — while simultaneously being treated as "real property" for Division 855 purposes, meaning that a foreign resident's disposal of an interest in an entity holding that asset is a taxable Australian real property interest. This inconsistency will generate significant confusion and compliance costs, particularly in the infrastructure and energy sectors where the distinction between structural components and plant is commercially and legally significant.

Recommendation

CPA Australia submits that the definition of "real property" for Division 855 purposes should be aligned with the Division 43 / Division 40 boundary as the most principled and administrable delineation already embedded in Australian tax law. Assets that would be characterised as plant under Division 40 — and therefore not as structural improvements to land — should not be characterised as real property for Division 855 purposes. The EM should include worked examples demonstrating how the Division 40/43 boundary applies in the infrastructure and renewable energy context.

Tax treaties interaction

The interaction between the proposed retrospective amendments and Australia's tax treaty network remains unclear and requires explicit clarification in the legislation or explanatory materials. In particular, it should be confirmed whether the flow through to treaties that adopt or defer to Australia's domestic law in defining "real property" or equivalent concepts is retrospective. Part 3 of the draft legislation is silent on its application date and needs clarification. Conversely, for treaties that contain a self-contained definition, such as those based on the OECD Model or that do not reference domestic law, it should be made clear that the amendments will not alter the operation of those treaties. Absent such clarification, there is a risk of uncertainty, inconsistent application, and potential disputes regarding Australia's taxing rights under its treaty obligations.

Uncertainty around CGT non-resident withholding obligations for residents

CPA Australia is concerned that the proposed retrospectivity of the amendments will give rise to technical risks that Australian resident purchasers could be liable retrospectively under the Foreign Resident Capital Gains Withholding (FRCGW) rules (including penalties). In particular, the view expressed in the EM that the measures "clarify" the definition of taxable Australian property may open up a risk that the Commissioner could argue that residents who had validly accepted vendor declarations should have questioned whether they were "false" - in light of the proposed retrospective amendments. This is clearly not the case because taxpayers would not have been aware of the proposed amendments at the time of the relevant disposals in years in which the FRCGW rules apply. Accordingly, this is another reason why the measures should not have retrospective effect.