

Australia: From Power Lines to Gold Mines

Federal Court clarifies 'taxable Australian real property' for foreign resident CGT

Required information: Abstract: *Two Federal Court decisions provide welcome clarity to foreign residents regarding the scope of the capital gains tax provisions to foreign residents*

In brief

The final quarter of 2025 has seen the Federal Court hand down two decisions relating to the application of capital gains tax (CGT) provisions to foreign residents in the context of disposal by foreign residents of shares in an Australian company.

YTL Power Investments Limited v Commissioner of Taxation of the Commonwealth of Australia [2025] FCA 1317 and Newmont Canada FN Holdings ULC v Commissioner of Taxation (No 2) [2025] FCA 1356 provide clarity to foreign residents regarding the scope of these rules and have constrained the more expansive approach pursued by the Commissioner.

At the core of these proceedings lies an assessment of the extent to which the value of the Australian entity was derived from Australian real property.

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Key takeaways

YTL Power Investments Limited v Commissioner of Taxation of the Commonwealth of Australia [2025] FCA 1317 (YTL) was handed down on 30 October 2025. In this case, the Court held in favour of the taxpayer and considered whether certain rights in relation to electricity infrastructure assets of an electricity company in South Australia were "real property situated in Australia (including a lease of land)".

Newmont Canada FN Holdings ULC v Commissioner of Taxation (No 2) [2025] FCA 1356 (**Newmont**) was handed down on 10 November 2025. In this decision, the Court made several findings in relation to whether certain gold mining assets held by Newmont Australia Pty Ltd (**Newmont Australia**) were Taxable Australian Real Property (TARP), as well as the correct approach to valuing particular assets.

- The term "real property" in the context of Division 855 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) bears its "technical meaning in the general law", as opposed to its broader, ordinary meaning. In determining whether certain assets are "real property", the Court looks to whether they are regarded as part of the land itself at law.
- For the purposes of foreign resident CGT rules, a careful analysis should be undertaken of the rights to infrastructure assets which are conferred under the statute and/or the relevant agreements, having regard to the statutory context within which those rights arose.
- Care should be taken to verify the independence, qualification, and suitability of experts used to give evidence, particularly if the evidence requires value judgments as to choice of methodology.
 - The proposed reforms to the foreign resident CGT regime seek to clarify and broaden the types of assets on which foreign residents will be subject to CGT. Once implemented, these measures may capture rights to assets with a close economic connection to land, despite any deeming statutory provisions to the contrary, which to some extent may negate the effect of these new decisions.

In more detail

Background

YTL Power Investments Limited (YTL), a Malaysian based company, appealed a decision by the Commissioner to disallow its objection to an amended assessment issued by the Commissioner under which YTL was assessed on the capital gains of AUD 948 million on the disposal of its shares in ElectraNet Pty Ltd (**ElectraNet**).

ElectraNet was an electricity transmission company which operated in South Australia under a number of agreements governed by legislation, including a Transmission Network Lease with Transmission Lessor Corporation (TLC) (a public corporation established under the South Australian government).

Pursuant to this Network Lease, ElectraNet had rights to "Leased Assets" which comprised "electricity infrastructure" assets in South Australia situated on three types of land, being (1) land not belonging to either TLC or ElectraNet, (2) land belonging to TLC, and (3) land belonging to ElectraNet. The questions presented to the Court were whether those rights as regards to the three categories of land were considered to be "real property situated in Australia" and therefore constitute TARP for the purpose of Division 855 (and therefore, the membership interest that YTL held in ElectraNet constituted an indirect Australian real property interest and subject to CGT).

Decision

Meaning of "real property"

The Court rejected the Commissioner's contention that the term "real property" in the context of the TARP regime had its "ordinary meaning". Rather, the Court held that "real property" has its technical meaning at general law, referring to prior High Court precedent as well as Australia's international tax agreements which, when using the same phrase, generally contain a clause which provides that the term has the meaning which it has "under the law of the Contracting State". The Court also considered that the definition of TARP was broadened under Division 855 of the ITAA 1997 to include a "lease of land", which would not otherwise be considered "real property".

The Court further found that the term "real property" in the context of section 855-20 does not refer to the physical attributes of an item, but rather the estate or interest of an entity. This meant that the issue for determination was whether the rights conferred upon ElectraNet under the relevant agreements and statutory provisions as lessee of the Leased Assets were "real property" or a "lease of land". The Court noted that the statutory provisions did not themselves define the nature of the rights conferred on the owner of the infrastructure and should be interpreted having regard to the context within which the statutory rights arose.

Were the rights conferred on ElectraNet in relation to Leased Assets on third party land "real property"?

The Court found that the rights conferred on ElectraNet under the Transmission Network Lease in relation to Leased Assets on land not belonging to TLC or ElectraNet did not constitute "real property" within the meaning of section 855-20.

The statutory easements to access the Leased Assets granted under the relevant agreements and South Australian legislation were found not to be "real property". This is on the basis that the statute granting these rights to ElectraNet did not grant a common law easement, nor did it confer an interest in the land, and the statutory "easements" were not rights of exclusive and unrestricted use, but rather rights granting a limited scope of exercise, which would cease should the transmission business also cease.

The private easements to access third party land that ElectraNet acquired an equal undivided share from TLC and leased TLC's undivided interest in were rights of access to third party land. These access rights did not carry with them the right to use, lease, or operate the electricity transmission infrastructure that had been placed on that land. Accordingly, while the access arrangements may have conferred an interest in land that constituted real property, any rights with respect to the use, lease, or operation of the Leased Assets were not.

Were the rights conferred on ElectraNet in relation to Leased Assets on land belonging to TLC or ElectraNet "real property"?

The Court found that the rights conferred on ElectraNet in relation to Leased Assets under the Network Lease situated on land belonging to TLC or ElectraNet (including where land was subject to a private easement conferred on TLC) did not constitute "real property" within the meaning of section 855-20.

However, in relation to land that was owned by TLC in fee simple which was not the subject of the statutory easements, ElectraNet obtained a lease of the land on which the infrastructure was situated pursuant to the Land Lease. This lease was real property in Australia.

The consequence of the specific South Australian legislation, which governs both the operation of the electricity network in South Australia and the rights to the infrastructure assets, was that the source of ElectraNet's rights to the use of the Leased Assets was separate to and severed from the interest in land ElectraNet had (either freehold or leasehold) despite their co-location.

Accordingly, the lease of the Leased Assets is taken to be a lease of personal property, and therefore not "real property" for the purposes of section 855-20.

Conclusions and takeaways

Despite the Court's finding in favour of the taxpayer, the Court's decision was the result of the interpretation of the statutory rights conferred on the operator of the electricity transmission infrastructure in the context of the specific state-based statutory regime that governs the electricity industry in South Australia. Given this, foreign resident taxpayers seeking to dispose of interests in infrastructure assets should undertake a careful analysis of the rights to these assets conferred under the relevant agreements and/or any statutory provisions, having regard to the statutory context within which those rights arose.

Additionally, the proposed reforms to the foreign resident CGT regime announced by the Australian government in 2024 seek to clarify and broaden the types of assets on which foreign residents will be subject to CGT to assets with a close economic connection to Australian land and/or natural resources (e.g. energy and telecommunications infrastructure). Once implemented, these measures could be broad enough to capture rights to infrastructure assets with a close economic connection to Australian land, regardless of whether there is a statutory deeming provision, for example, which deems the rights to be personal property separate from the land.

On 13 November 2025, the Commissioner lodged an appeal of the YTL case. Taxpayers should watch this space.

Newmont decision

Background

These proceedings concern the liability of Newmont Canada FN Holdings ULC (**Newmont Canada**) and Newmont Capital Limited (**Newmont US** and together the **Newmont Vendors**) to tax on a capital gain resulting from a restructure of its Australian gold mine assets by way of a sale of the Newmont Vendors' shares in Newmont Australia to a related Australian entity. The total primary tax in issue exceeds AUD 96 million plus penalties and interest.

This decision concerned whether Division 855 operated to disregard the capital gain on the share sale on the basis that the shares were not 'taxable Australian property'. Relevant to this ascertainment was determining whether the sum of the market values of its assets that were TARP exceeded that of the assets that were not TARP. In doing so, the Federal Court addressed a number of issues, including:

- Whether mining plant and equipment affixed to land which is the subject of mining tenements may be considered "real property"
- The correct approach to valuing particular assets (i.e. mining information, mining tenements, ore stockpiles, derivatives, plant and equipment)
- When it is appropriate to apply discounts for lack of control and marketability

Decision

"Real property" in the context of mining plant and equipment

As was the case in YTL, the Court found that the expression "real property" in the definition of TARP was to be given its technical legal meaning.

In this case, the Court took real property to include mining plant and equipment only if it formed part of the land or part of a lease at general law. However, the Court did not find that the mining plant and equipment owned by Newmont Australia formed part of the TARP held by Newmont Australia.

This was on the basis that while the plant and equipment may have been fixtures on the land at common law, the source of the right to locate the plant and equipment on the land was the mining tenements. As the mining tenements were personal property which did not confer any interest in land, the mining plant and equipment therefore did not form part of the TARP owned by Newmont Australia. This was despite it consisting of common law fixtures to land in which Newmont Australia may have had a leasehold or freehold interest.

Approach to valuing assets under the TARP regime

The Court reached numerous conclusions in relation to valuation disputes, but final calculations were referred to a referee. Some of the key findings are as follows:

- **Gold prices:** The Court approved the expert analysis preferred by the Newmont Vendors which used an evaluative econometric analysis for the longer-term price of gold, analyst consensus, and the 'futures/forward prices' published by Bloomberg for nearer-term pricing. The Court rejected the expert analysis preferred by the Commissioner, which relied solely on the nominal gold futures price curve and forward price curve produced by Bloomberg, finding that these were of limited relevance as a reliable indicator of market expectations of expected future spot prices for gold.
- **Intercompany loans:** Notably, the Court found that intercompany loans and receivables were not to be considered assets for the purposes of section 855-30, which is focused on the calculation of assets and not any liability that may be said to be associated with or connected with the assets.
- **Levered beta value:** The Court found that the appropriate levered beta value to be used to determine the discount rate to be applied in the DCF analysis was 0.7, which was based on a 5-year data set that was less impacted by the Global Financial Crisis, with data taken weekly from publicly traded companies that conducted mining operations that were appropriately comparable to those conducted by Newmont Australia.
- **NAV Multiple:** The Court accepted that a NAV multiple should be applied to the outcome of the DCF analysis to adjust for the 'gold premium', a phenomenon where an analysis of value of gold mining companies based on expected future cash flows generally produces a lower value than that indicated by the prevailing share price of the same company.
- **Mining information:** The Court rejected arguments by the Commissioner that the mining information had a value of AUD 0 as it could have been acquired during due diligence and used unlawfully in breach of the rights of the vendor, and instead adopted the proposed expert valuation of AUD 371 million. Discount for lack of control and marketability

The Court accepted that there should be a discount of 7.5% to the amount of capital proceeds for the sale of shares for the lack of control and 2% for the lack of marketability. Specifically, on the lack of control, the Court considered multiple factors to be relevant. Namely, the diminished value of shares purchased by a minority shareholder without the protections of a joint venture agreement, the financial motivation and capability of Newmont to maximise the capital value of its interests in the mines, the large nature of the investment, and the likely-aligned interests of the shareholders in further capital returns.

On the discount for lack of marketability, the Court saw the appropriate discount as one that provides adequately for the financial and legal costs of arranging and completing the sale of the shares. The Court observed that the market for shares in gold mining companies was liquid with a range of institutional investors and large mining companies who would be interested buyers of such interests.

Conclusions and takeaways

- As mining tenements are personal property, and common law fixtures form part of the freehold estate (rather than the leasehold), mining plant and equipment affixed to land the subject of mining tenements were not "real property" for the purposes of the TARP regime, despite being fixtures at common law.
- The Court made various observations as to the correct approach to valuing certain gold mining assets, resolving disputes between various different experts. In future, care should be taken to verify the independence, qualification, and suitability of experts used to give evidence, particularly if the evidence requires value judgments as to choice of methodology.
- The final valuation was referred to a referee by the Federal Court on 18 December 2025. The Commissioner has not appealed this case and the deadline for lodging an appeal has now passed.

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