

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

Submitted online via Australian Government, The Treasury Consultation Hub

23 April 2026

Dear Sir or Madam,

**Strengthening the foreign resident CGT regime – draft legislation  
Submission to Exposure Draft Legislation and Explanatory Materials**

We make our submission in respect of the “Strengthening the foreign resident capital gains tax – draft legislation” which sets out the Exposure Draft legislation and Explanatory Materials for the Government’s 2024-25 Budget measure (the **Exposure Draft**).

This submission is made jointly by:

- Public Sector Pension Investment Board (**PSPIB**), a Canadian Crown corporation that invests amounts transferred to it by the Government of Canada for the pension plans of the Canadian Public Service, the Canadian Forces, the Royal Canadian Mounted Police and the Reserve Force. PSPIB has C\$299.7 billion of net assets under management as at 31 March 2025 and invests globally in a variety of asset classes, including natural resources, public markets, private equity, real estate, infrastructure and credit investments.
- The New Zealand Superannuation Fund (**NZSF**), a long-term, growth-oriented, global investment fund that is funded by the New Zealand Government. NZSF exists to help provide for the future funding of retirement benefits paid by the New Zealand Government which are guaranteed to all New Zealanders aged 65 and older. NZSF has NZ\$89.9 billion of assets under management as at 31 October 2025 and invests in diversified assets throughout the world, including Australia.

together (the **Foreign Funds**).

The Foreign Funds have a range of investments in Australia across diversified asset classes including infrastructure, telecommunications, utilities, renewable energy, agriculture and real estate. The Foreign Funds have also collaborated to provide balanced and constructive submissions to both Treasury and Senate Economics Committees on a range of previous public consultations relating to proposed changes to Australia’s taxation laws, including the ‘Strengthening the foreign resident CGT regime’ consultation paper released in July 2024.

Based on the Exposure Draft legislation, the Government’s 2024-25 Budget measure, once enacted, will significantly alter the application of Australia’s taxation laws for certain investments. There are certain aspects of the Exposure Draft legislation that raise concerns for the Foreign Funds, as long term institutional investors with both majority and minority positions in Australian assets. We have highlighted these in our submission for consideration as part of the law design process.

## **Impact on Australia’s reputation as a stable investment jurisdiction**

Australia has traditionally been regarded as a stable and predictable investment jurisdiction. This reputation is valuable and plays a significant factor in institutional investors' decisions to allocate capital to Australia. Foreign investors making long-term capital allocation decisions need confidence that the fiscal terms on which they invest will be respected. For long-term institutional investors, this confidence is grounded in reasonable reliance on the legislative framework and stated policy intent applying at the time investment decisions are made. If that confidence is undermined, investors may discount or disregard other Government concessions that are designed to attract capital to Australia when assessing future investment opportunities.<sup>1</sup>

The current form of the Exposure Draft legislation sends an adverse signal to foreign investors. As institutional investors, we are particularly concerned by proposals to:

- retrospectively change Australia’s tax laws to bring certain Capital Gains Tax (**CGT**) assets within scope (by extending the operation of the changes back by an extraordinary 20 years and seeking to change the historic operation of Australia’s Tax Treaties); and
- broaden the foreign resident CGT tax base without any form of transitional relief for unrealised capital gains.

If enacted, these measures would establish a concerning precedent as the Australian Government would be taxing assets and gains that were previously subject to deliberate policy concessions or exemptions under Australia’s tax framework. Such an outcome risks undermining confidence in the stability and integrity of Australia’s tax system and may adversely affect investor confidence when assessing future long-term investment opportunities.

We strongly urge Treasury and the Government to consider these fundamental aspects of the Exposure Draft legislation to ensure that the principles of equity and efficiency are maintained and the application of Australia’s Tax Treaties are respected as the changes to the CGT rules that apply to foreign residents are developed.

## **Supporting investment by improving the competitiveness for foreign funds**

Australia, Canada and New Zealand are home to a distinct cohort of institutional investors reflecting the presence of world leading pension, superannuation and sovereign investment funds. A history of consistent capital inflows, combined with global investment mandates focused on generating long term returns, reinforces the structural similarities between those jurisdictions.

When it comes to investment in Australia, there is a significant (and growing) misalignment in the tax settings that apply to foreign and domestic institutional investors. The current settings already increase the fiscal cost for foreign funds and impacts the competitiveness of Australia as an investment destination. Better alignment of taxation outcomes between foreign institutional investors and Australian superannuation funds would allow these investors to operate collectively on a more comparable footing for future productivity enhancing investment in Australia.

The proposal to “broaden” the scope of assets that would fall within Australia’s CGT regime for foreign residents further widens this fiscal gap for foreign institutional investors. The proposed changes would also make Australia’s CGT rules for foreign investors materially broader than those adopted in many comparable jurisdictions. As a result, foreign institutional investors would be subject to an effective tax rate of 30% on a larger pool of investments, compared with an effective

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<sup>1</sup> Recent changes to Australia’s tax laws that have affected the Foreign Funds include limiting access to the managed investment trust concessions (including stapled structure integrity measures), the tightening of sovereign immunity settings, limiting the pension fund treatment, significant changes to interest deductibility rules, the introduction of foreign surcharges on property investments and non-discrimination Treaty protections revisited. These changes have been closely monitored by foreign institutional investors and have contributed to increased sensitivity around policy stability and investment certainty.

tax rate of approximately 10% for Australian superannuation funds. This disparity places foreign institutional investors at a significant competitive disadvantage when bidding for Australian assets.

The implications for future investment into Australia by foreign institutional investors are further compounded by the absence of broadly available investor-based concessions in Australia, particularly when compared with those offered in other comparable jurisdictions. The Foreign Funds therefore encourage Treasury and the Government to consider expanding the scope of Australia's investor-based concessions for foreign institutional investors in order to support Australia's attractiveness as a destination for long-term institutional capital.

## **Our key submissions on the Exposure Draft**

The Foreign Funds support a clear and well-functioning CGT and revenue collection framework. The Foreign Funds make the following key submissions in relation to the Exposure Draft legislation:

### **1) Transitional relief for assets captured by “broadening” the CGT rules**

The Exposure Draft makes it clear that the Government intends to “broaden” the scope of assets upon which foreign investors are subject to CGT in Australia – effectively bringing these assets into Australia's tax base once the changes commence. However, the Exposure Draft does not contain any transitional relief for assets which become taxable from this date. As currently drafted, the Government would be taxing long term foreign investors on gains that accrued when such assets were not subject to CGT in Australia.

The Foreign Funds submit that transitional relief, in the form of a cost base reset to market value as at the date the changes commence, should be provided for all CGT assets and interests (including indirect membership interests) that become taxable in Australia as a result of the expansion of the CGT rules for foreign residents.

Without such transitional relief, the Government would effectively reverse, in full, a long-standing tax concession where the expressly stated policy intention was to attract foreign investment into Australia and upon which foreign investors have relied for more than two decades when making decisions to commit substantial capital to Australia.

### **2) Foreign resident CGT withholding regime**

The proposed amendment introduces an objective “could reasonably be expected to know” test that fundamentally shifts the risk and compliance burden for revenue collection from vendors and the Australian Taxation Office (ATO), to the purchaser of CGT assets. In our experience, the proposed test will create significant challenges for parties to ordinary commercial transactions.

The proposed statutory test is distinct from the broad range of withholding provisions that currently support Australia's revenue collection system. The amended test would expose purchasers of Australian CGT assets to future litigation risk with the Commissioner of Taxation (the **Commissioner**) in relation to withholding obligations given ‘objective tests’ are highly dependent on the specific facts and circumstances, and they are routinely the subject of disputes between taxpayers and the Commissioner.

To provide greater certainty to purchasers, we submit that the legislation should include both:

- a safe harbour from the withholding obligation where the Commissioner has been notified of the transaction and received an independent valuation to support the vendors' declaration that the interests are not “an indirect Australian real property interest” (IARPI), and

- a legislative mechanism for the purchaser to request the Commissioner to make a determination of the withholding obligation which could be utilised in circumstances where there is genuine uncertainty or commercial tension between the parties.

The inclusion of the above (a safe harbour and a statutory mechanism for the Commissioner to make a determination) would better support the operation of the withholding rules, while achieving the policy intent to secure revenue collection on IARPI.

### **3) Simplifying the 365-day valuation test**

The proposed 365-day testing period under the principal asset test (**PAT**), is likely to impose a significant compliance burden on both purchasers and foreign vendors, who would be required to determine asset values across the 365-day period prior to disposal. This burden will be exacerbated where investors decide to dispose of an asset at short notice, or where a sale or purchase arises from an opportunistic or short-dated bid, in circumstances where the investor has not spent the preceding 365 days undertaking regular asset valuations.

To improve the efficiency and workability of the regime, we submit that the legislation should include a simplified testing methodology or safe harbour - particularly for minority investors who may have limited access to information, and in sectors where asset values are inherently volatile or seasonal.

Our detailed submissions are set out below.

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### **Submission 1: Transitional relief for assets captured by “broadening” the rules**

The non-resident CGT rules were introduced in 2006<sup>2</sup> with the following aims:

- to enhance Australia’s attractiveness for foreign investment by removing the deterrent effect of broad-based foreign resident CGT rules; and
- to encourage investment into Australia by aligning domestic law more consistently with international practice (including Australia’s tax treaties) while providing greater certainty and lower compliance costs.<sup>3</sup>

Consistent with, and in reliance on, these policy settings, foreign institutional investors (including the Foreign Funds) have invested substantial capital in Australian transport infrastructure, telecommunications, utilities, renewable energy and agricultural assets.

### ***Institutional investors approach to capital allocation and investment decisions***

In making and holding long-term investments, investors have proceeded on a well-established and reasonable expectation (formed by reference to the legislative framework and Australia’s stated policy intent) that capital gains realised on disposal would not be subject to CGT where the asset disposed of did not constitute taxable Australian property (**TAP**).

When committing significant capital to investments, institutional investors require a high degree of certainty regarding the overall return on an investment, of which tax is a material component. In making investment decisions, the Foreign Funds undertake an assessment of whether an asset

<sup>2</sup> Tax Laws Amendment (2006 Measures No. 4) Bill 2006.

<sup>3</sup> The Revised explanatory memorandum to Tax Laws Amendment (2006 Measures No. 4) Bill 2006 states: “This measure narrows the range of assets on which a foreign resident will be liable to Australian CGT to Australian real property... This will further enhance Australia’s status as an attractive place for business and investment by addressing the deterrent effect for foreign investors of Australia’s current broad foreign resident CGT tax base....”

constitutes TAP (or non-TAP), based on a combination of explanatory materials, professional taxation advice, judicial decisions and publicly available ATO administrative guidance.

Where an asset is determined to be non-TAP, the investment decision and pricing are made on the basis that no Australian CGT will arise on disposal. The current proposal to subject such assets to CGT after the investment has been made would therefore have a significant and immediate adverse impact on investor returns. This impact is further magnified where accrued economic gains are retrospectively brought within the Australian CGT net.

### ***Policy distinction between "clarification" and "broadening"***

The Exposure Draft materials make a clear distinction between:

- A "**clarification**" of the existing CGT rules – which are proposed to apply retrospectively back to 12 December 2006 under proposed Item 20(3) and (4) of the draft legislation – with these changes intended to confirm the scope of assets that have been subject to Australia's CGT rules since the introduction of Division 855; and
- A "**broadening**" of the CGT rules to cover asset classes that were not previously subject to Australia's CGT rules. For example, the proposed paragraph (c) in section 855-20 which would include "a water entitlement in relation to a water resource situated in Australia" as "taxable Australian real property" (**TARP**) — a category of asset that was not previously TARP under the existing law.

The Explanatory Materials also expressly confirm that the amendments "*clarify and broaden the foreign resident CGT tax base*" and acknowledge that the inclusion of water entitlements, options and rights to acquire TARP represents an expansion of the CGT base.

### ***Retrospective change due to 'clarification' and Tax Treaty interaction***

As outlined above, the Foreign Funds are concerned with the proposal to retrospectively change Australia's tax laws (over a 20-year period) to make assets subject to CGT where, under the current operation of Australia's tax laws and other Federal and State legislation, such assets would not be subject to CGT in Australia.

The Foreign Funds are both tax residents in countries that have entered into an agreement with Australia to avoid the double taxation and the prevention of fiscal evasion with respect to taxes on income (**Tax Treaty**). Based on the Exposure Draft, it is unclear whether the retrospective changes to the meaning of "taxable Australian real property" in section 855-20 of the *Income Tax Assessment Act 1997 (ITAA 1997)* are intended to have effect for the purpose of Australia's Tax Treaties.

It is essential that the operation of Australia's Tax Treaties to past transactions is respected as the Government amends the CGT rules for foreign residents. Any changes that have effect for the purpose of the Tax Treaties ought to be prospective only. This would include the proposed changes to section 855-20 of the ITAA 1997 and subsection 3(5) of the *International Tax Agreements Act 1953*. Where the Exposure Draft seeks to retrospectively amend Australia's tax laws to alter the past or current operation of Australia's Tax Treaties it would expose foreign residents to double taxation<sup>4</sup> and undermine the fundamental purpose of the Tax Treaty.

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<sup>4</sup> It is conceivable that foreign residents will have paid tax on the sale of interests in an Australian company or trust in the Contracting State in which they are a resident in accordance with the tax treaty that applied at the time it disposed of the CGT asset. Where the amendments have a retrospective effect for the purpose of Australia's Tax Treaties, the foreign resident could be liable for tax in Australia on the same transaction. In the circumstances where the foreign resident is statute barred from amending the tax return in the Contracting State in which it is a resident, it would be exposed to double taxation because of the retroactive changes to Australia's tax laws.

We submit that Treasury clarifies this application in the Exposure Draft materials to remove any ambiguity from the changes and ensure that the previous operation of Australia's Tax Treaties is respected.

***Transitional relief for assets captured by “broadening” the CGT rules***

To the extent that the proposed changes seek to broaden the range of assets on which foreign residents are subject to CGT in Australia, we submit that appropriate transitional relief should be provided. In particular, a cost base reset to market value as at the date of commencement of the new provisions would ensure that only gains accruing after the change in law are subject to Australian CGT.

This submission is made for the following reasons:

- *Clear change in policy and expansion of the tax base*

The Exposure Draft materials explicitly acknowledge that the scope of assets subject to Australian CGT is being "broadened". This represents a substantive change in policy and an expansion of the Australian tax base, rather than a mere clarification of existing law.

- *Reliance on the law as it stood at the time of investment*

The Foreign Funds and other institutional investors made decisions to acquire and hold Australian assets for the long term based on the CGT rules as they existed at the time of the investment decision and prior to any announcement of proposed changes. Subjecting gains that accrued during a period when those assets were not within scope of Australian CGT would constitute a retrospective change to the legislative framework on which those investments were made, undermining both equity and confidence in the tax system. At a minimum, only gains accruing after the commencement of the amendments should be subject to Australian CGT.

- *Inequitable outcomes for long-term investors*

Investors should not be penalised for long-term ownership. Absent transitional relief, investors who have held assets for extended periods — and who have contributed to the Australian economy through sustained, long-term capital commitment — would face a disproportionately higher tax burden than recent investors. Such an outcome is inequitable and risks discouraging the provision of long term, patient capital into Australia.

- *Established domestic precedent for transitional relief*

Australia has a well-established precedent for providing transitional relief where tax law changes expand the scope of assets subject to taxation. Relevant examples include:

- the original introduction of the non-resident CGT rules in Division 855,
- the introduction of the sovereign immunity rules in Division 880, and
- the transition of pre-CGT assets into the CGT regime through Division 149.

- *Alignment to international practice*

As global investors, we have observed that other jurisdictions adopt appropriate transitional provisions when expanding non-resident CGT regimes. For example, when the United Kingdom (UK) expanded its non-resident CGT rules in April 2019 to cover direct and indirect disposals of UK immovable property,<sup>5</sup> the rules effectively reset the taxpayer's cost base to market value from the day before the amended rules came into effect. Taxpayers

<sup>5</sup> Finance Act 2019 (United Kingdom). <https://www.legislation.gov.uk/ukpga/2019/1/enacted/data.pdf>

were also permitted, in certain circumstances, to elect to use historical cost (e.g. where the historical tax cost base exceeded the market value of an asset at the transitional date).

Absent appropriate transitional relief, the proposed changes would have an immediate and material impact on investors, arising from the need to reassess expected investment returns and account for future tax liabilities in respect of unrealised gains that were not previously regarded as TAP. This economic impact would be particularly acute for investors who have held investments for many years and are approaching an exit point or realisation event.

For these reasons, the inclusion of a proportionate transitional measure is critical in the context of assets captured by the proposed broadening of Australia's CGT rules. The Foreign Funds, and other similarly situated institutional investors, have made long-term investment and pricing decisions in reasonable reliance on the legislative framework and stated policy intent that applied at the time those investments were made.

Appropriate transitional relief would recognise those legitimate expectations and preserve confidence in the stability and integrity of Australia's tax system. It would allow an investor either to realise or exit investments in an orderly manner, or alternatively to continue holding those investments with the assurance that only gains accruing after the commencement of the amendments will be subject to Australian CGT. Relevantly, the legislative architecture for such a measure already exists within Australia's tax law and could be readily replicated as part of the proposed amendments.

### ***Inequitable transitional relief for renewable energy assets***

The "*Strengthening the foreign resident capital gains tax*" package includes separate Exposure Draft materials which propose a limited transitional measure for certain renewable energy assets. Under this proposal, foreign resident investors would be permitted to access the 50% CGT discount on capital gains realised between the commencement date of the new rules and 30 June 2030.

The Foreign Funds consider this proposed transitional measure to be inadequate and inequitable. The stated policy objective of the 50% CGT discount is to mitigate the taxation of inflationary gains on CGT assets. By contrast, the proposed transitional measure implicitly acknowledges that foreign residents would be subject to Australian CGT on economic gains that accrued during a period when those assets were not within scope of Australia's CGT regime.

We submit that economic gains which accrued between the time of investment and the broadening of the CGT rules should remain non-taxable in Australia. The appropriate and equitable method to achieve this outcome is to allow taxpayers to elect for the cost base of the relevant CGT asset to be reset to market value as at the commencement of the new provisions, thereby ensuring that only gains accruing after the change in law are subject to Australian CGT.

#### **Submission:**

##### *Transitional measure*

Given institutional investors such as the Foreign Funds have made substantial long-term investments in Australia in reasonable reliance on the existing policy settings and taxation laws, we submit that the Exposure Draft should be amended to incorporate appropriate transitional relief for assets and interests brought within the scope of Australia's foreign resident CGT regime as a result of the proposed broadening of the rules.

Specifically, we submit that the transitional rule should allow foreign investors to elect to reset the cost base of a directly or indirectly held asset to its market value as at the commencement of the amendments, so that only gains accruing after that date are subject to Australian CGT. Such an approach would appropriately preserve legitimate expectations, avoid the retrospective

taxation of accrued economic gains, and ensure consistency with established domestic and international practice.

The legislative architecture for implementing such a transitional measure already exists within Australia's tax framework and could be readily replicated for the purposes of Division 855 of the Income Tax Assessment Act 1997. We would welcome the opportunity to engage further on how such drafting could most effectively be achieved.

*Retrospective changes and interaction with Australia's Tax Treaties*

Update the Exposure Draft to make it clear that the proposed changes to section 855-20 of the ITAA 1997 and subsection 3(5) of the *International Tax Agreements Act 1953* are prospective only and the operation of Australia's tax treaties will be respected.

## **Submission 2: Foreign resident CGT withholding rules**

The Exposure Draft proposes significant changes to the foreign resident CGT withholding rules by requiring a purchaser to withhold where the purchaser "*knows, or could reasonably be expected to know*" that a vendor's declaration (that the relevant interest is not an IARPI) is false.

Under the current rules, a purchaser can rely on a vendor's declaration unless the purchaser has actual knowledge that it is false. By contrast, the proposed amendments would require purchasers to effectively undertake an independent assessment of the full facts and circumstances that relate to a vendor's declaration, with potential exposure to a penalty liability<sup>6</sup> where the purchaser "*could reasonably be expected to know*" that the declaration was incorrect - even in circumstances where the purchaser did not have actual knowledge at the time of the transaction.

As confirmed in the Explanatory Materials, this represents a shift from a subjective test (requiring actual knowledge) to an objective test, placing "*a higher onus on purchasers to more actively consider ordinary due diligence results and readily available information rather than rely exclusively on vendor declarations*".

The Foreign Funds submit that the proposed test imposes a disproportionate compliance burden on the purchaser of CGT assets from foreign resident vendors and is likely to create significant commercial tension between vendors and purchasers in ordinary transactions.

Our specific concerns are as follows:

- *Ambiguity and inconsistency with withholding regime design*

The proposed "*could reasonably be expected to know*" test introduces material ambiguity and is inconsistent with the broader legislative design of Australia's withholding regimes. While Australia's tax laws contain various objective tests, such provisions are frequently the subject of litigation due to their dependence on highly fact-specific assessments.<sup>7</sup> In the withholding context, Australia's tax framework has traditionally allowed the withholder to rely on information provided by the party with the requisite knowledge, supported by requirements to give notices, make information available or provide declarations.. The proposed departure from this established law design principle under Australia's withholding regime is concerning given the scale and complexity of transactions to which the foreign resident CGT withholding rules apply.

<sup>6</sup> The purchaser could be liable for the amount that was required to be withheld plus penalties for failure to pay or failure to pay within time under Division 16 of the *Tax Administration Act 1953*.

<sup>7</sup> Examples include private company benefits in Division 7A, capital and dividend integrity rules in Section 45A, section 45B and section 45C and broader integrity provisions across the general anti-avoidance rules in Part IVA of the *Income Tax Assessment Act 1936*, company loss rules in Division 165, the debt deduction creation rules in Subdivision 820-EAA and the transfer pricing rules in Division 815 of the ITAA1997.

- *Impracticality and information asymmetry*

The proposed test is impractical in circumstances where it requires a purchaser to independently assess whether a vendor's interests constitute an IARPI. This assessment would require visibility over a target entity's underlying asset composition and values (potentially over a 365-day period) in circumstances where the purchaser is unlikely to have access to complete or reliable information. The proposed changes effectively reverse the consequences of information asymmetry: although the vendor is best placed to know whether its interest is IARPI, the purchaser bears the penalty risk if it fails to identify that the vendor's declaration was false.

- *Commercial tension and untenable risk allocation*

The proposed changes will also create significant commercial tension between vendors and purchasers. A vendor may provide a declaration that an interest is non-IARPI and confirm that notice has been given to the Commissioner under proposed section 14-226(1). Nevertheless, the purchaser could remain exposed to failure-to-withhold penalties if the Commissioner subsequently asserts that the purchaser "*could reasonably be expected to know*" the declaration was false. This creates a commercially untenable allocation of risk, particularly in large and complex transactions.

The policy intent of the withholding regime is to secure revenue where there is a risk that the foreign vendor may depart Australia without meeting its CGT liability. Where the Commissioner has been notified and had an opportunity to intervene prior to completion, and where an independent valuation supports the vendor's position, that policy objective has largely been achieved. In those circumstances, exposing the purchaser to penalty liabilities is disproportionate.

### **Proposed amendments**

To address these concerns, we submit that the Exposure Draft should be amended to include:

- **A safe harbour protection** where the vendor supplies relevant valuation and asset composition information to the Commissioner as part of the notice under proposed section 14-226(1), such that the purchaser is protected from failure-to-withhold penalties where the Commissioner had a reasonable opportunity to intervene prior to transaction completion; and
- **A Commissioner's determination mechanism** allowing a purchaser to request a binding determination of the withholding obligation within a reasonable period of time in circumstances where there is genuine uncertainty between the parties.

**Submission:**

Amend the Exposure Draft to include a safe harbour protection for purchasers where the vendor has supplied supporting valuation information to the Commissioner under the proposed section 14-226(1) and to provide a legislative mechanism that allows purchasers to seek a determination from the Commissioner where there is uncertainty relating to the withholding obligation.

### **Submission 3: Safe harbour approach to the 365-day test**

The Exposure Draft and Explanatory Materials outline the Government's proposal to extend the testing period for the PAT to a 365-day period on the basis that the existing point-in-time approach presents an integrity risk.

However, the proposed change would significantly increase compliance complexity. In practice, it requires taxpayers (and potentially purchasers under the revised withholding rules) to produce or procure asset valuations covering the full 365-day period in order to determine whether an interest constitutes an IARPI. We foresee significant practical difficulties in applying this test in a range of common investment scenarios including the following:

- *Minority investors*

The 365-day test would be particularly burdensome for minority investors. A foreign resident holding as little as 10% of an entity may not have access to the detailed, asset-level information needed to commission or obtain valuations of the entity's underlying assets over an extended period. Minority investors typically do not control the entity and may not have contractual or governance rights to compel the entity to provide the necessary information or to engage valuers on their behalf.

- *Agriculture and seasonal assets*

The 365-day test is particularly difficult to apply in sectors characterised by seasonal or cyclical volatility. For agricultural investments, the value of biological assets (such as livestock, crops, and water allocations) fluctuates materially depending on seasonal conditions, commodity prices, and water availability. As a result, valuations taken at different points within the 365-day period may produce materially different outcomes, creating uncertainty as to whether the relevant PAT threshold is satisfied.

- *One-off events*

One-off events occurring during the testing period, such as a geopolitical disruption, natural disasters or significant (but temporary) market shocks, may distort asset values and composition in a manner that is not reflective of the entity's ordinary or long-term asset profile. Relying on such temporary distortions to determine CGT outcomes risks producing arbitrary and unrepresentative results.

### **Proposed approach**

To improve the workability of the 365-day test while maintain its underlying integrity objective, we submit that the legislation should include:

- *A simplified testing methodology* such as testing at regular intervals (for example at the end of each quarter), with a presumption that the results are representative for the period unless material transactions or events indicate otherwise; and
- *A specific safe harbour for minority investors* (for example, investors holding less than 20% of an entity) who do not have access to asset-level information and who have reasonably relied on information provided by the entity or its controlling owners.
- *A deeming rule* that allows for the normalisation or exclusion of one-off transactions or events that temporarily impact the value of a business during the 365-day period (such as allowing for a defined period of days within the overall period) and occur outside the control of the underlying business or the taxpayer.

**Submission:**

Amend the Exposure Draft to include a simplified testing methodology or safe harbour for the application of the 365-day PAT test, (such as quarterly testing), introduce a specific safe harbour for minority investors who do not have access or the ability to produce asset-level valuations over the full 365-day period and a deeming rule that normalises for one-off transactions or events that occur outside the control of the taxpayer or the underlying business.

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The Foreign Funds value and appreciate the ability to provide our views through the consultation process. We remain committed to constructive engagement with Treasury and would welcome the opportunity to discuss our submission further.

Yours sincerely

*Martin Boily-Côté*

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