

AUSTRALIAN TAX ADVISER

Issue 2704 | October 2026

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Section 1 – Professional Developments

SUPERFICIES SOLO CEDIT

This is a Latin maxim that outlines one of the principles of land law around the world. It simply means that movable property becomes immovable property if it is permanently affixed to that immovable property.

Subject to some notable exceptions¹, this rule granted the owner of the land an entitlement to whatever was permanently attached to that land. It was a distinctly Roman solution, in some cases differing from the norms of other ancient legal systems.

¶4.1 Division 855 and taxable Australian property

In Australia, the rule extends to foreign residents who own real property situated in Australia, but has been significantly curtailed by the introduction of Div 855 of the ITAA97. Specifically, [legislation](#) introduced in 2006 allowed a foreign resident to disregard a capital gain from the sale of any capital asset in Australia unless that asset was 'Taxable Australian Property' (TARP), which includes a direct or indirect interest in Australian real property. There were also special rules for:

- individuals who were Australian residents but had become foreign residents, and
- foreign resident beneficiaries of fixed trusts,

but that is beyond the scope of this article.

¶4.2 The Newmont decision

Recently though, the Federal Court handed down final orders in the [Newmont Canada FN Holdings ULC v FCT \(No 2\)](#) case and significantly, the Government has abandoned its attempt to rewrite the TARP rules retrospectively.

In its substantive findings, the Court rejected the Commissioner's expansive reading of the term 'real property' in Div 855 and found that **plant and equipment** on mining tenements is **not** TARP (irrespective of the mode of attachment to the real estate). It also set out detailed guidance on valuation methodologies for mining projects (specifically, gold price assumptions, discount rates, NAV multiples, and discounts for lack of control and marketability).

¹ For example, allowing separate ownership of floors within an existing building.