15 September 2023

Assistant Secretary, Personal and Small Business Tax Branch
Personal and Indirect Tax and Charities Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: individualtaxresidency@treasury.gov.au

Dear Sir/Madam,

Modernising individual tax residency

The Atlas Wealth Group appreciates the opportunity to comment on the Treasury's **Modernising Individual Tax Residency** Consultation Paper**.**

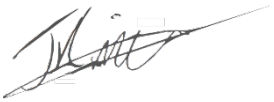
The Atlas Wealth Group is a group of several organisations that specialise in the provision of tax and financial advice to Australian citizens living and working overseas.

We work with Australians living in over 50 countries all of whom are impacted by the Residency Rules and in turn proposed changes recommended by the Board of Taxation.

As such we have both the experience and relevant interest in this issue, and we provide our submission in the format of the 14 questions set out in the Consultation Paper.

Yours sincerely





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Question 1 - 45 Day Threshold

How many days in an income year should an individual with strong connections to Australia be able to spend in Australia before they are considered a tax resident?

We assert that for an individual to have developed a strong connection to Australia they must have been in Australia for a period greater than 90 days. As the emphasis in this question is "**strong connections"** we believe that a period of 45 days is too short, and it does not prove that enduring ties to Australia have been reestablished.

As Australia is a long distance from most the world's major destinations it is plausible and feasible that any trip planned by an individual to Australia would be for a minimum of 2-3 weeks and if two trips were planned to Australia then the 45-day limit could be breached quite easily.

Whilst Treasury and the Board of Taxation (BoT) refer to the UK, and in turn the HMRC, as a benchmark when looking to use a 45-day count as a qualifying factor in determining residency, in fact they rely upon a more realistic timeframe of 90 days when comparing a similar situation to that of an Australian citizen living overseas and who has severed ties with Australia.

According to the HMRC [1]you maybe a resident under their automatic test if:

- you spent 183 or more days in the UK in the tax year
- your only home was in the UK for 91 days or more in a row - and you visited or stayed in it for at least 30 days of the tax year
- you worked full-time in the UK for any period of 365 days and at least one day of that period was in the tax year you're checking

Considering the HMRC's Overseas test you're usually a non-resident if either:

- you spent fewer than 16 days in the UK (or 46 days if you have not been a UK resident for the 3 previous tax years)
- you worked abroad full-time (averaging at least 35 hours a week), and spent fewer than 91 days in the UK, of which no more than 30 were spent working

Special attention should be made on the second point of the HMRC's overseas test as the measure is 91 days in the UK as long as the individual has worked abroad full time.

In the BoT's recommendation there is no qualification of whether the individual has worked abroad full time or not and as such we believe that using the day count purely based on whether the individual has spent greater than 45 days in Australia as a benchmark in modernising these new tax rules should not be considered.

[1] https://www.gov.uk/tax-foreign-income/residence#

Question 2 - 45 Day Threshold

Do you consider that days spent in Australia under certain circumstances should be disregarded for the purposes of the 45-day count? If so, why should days be excluded in some circumstances and not others. Who would decide?

There needs to be a more prescriptive process in determining what constitutes a qualifying day when implementing a day count as a threshold.

Australian citizens return to Australia for many reasons and these trips may be categorised for either personal or professional purposes, some of which include:

- **Personal**
    - Holiday
    - Visiting sick family members
    - Attending a family event like a wedding or funeral
- **Professional**
    - Attending conferences
    - Operating an aircraft or vessel to Australia as a natural part of their job
    - Attending company meetings
    - Visiting Australian based clients

As you can see not all of the reasons above are based on an individual's choice and the majority of them do not relate to the individual reinstating ties to Australia, more so attending to personal of professional requirements.

Excluding the number of days spent in Australia that do not relate to a reason based on personal choice (e.g., visiting Australia for a holiday) could be easily verifiable and the following qualifying documents could be used:

- **Personal**
    - *Visiting sick family member(s)* –letter from a registered doctor confirming the family member's condition.
    - *Attending a family event like a wedding or funeral* – evidentiary proof could be retained like a wedding invitation, death certificate or funeral order of service.
- **Professional**
    - *Attending conferences* – conference agenda and supporting documentation
    - *Operating an aircraft or vessel to Australia* – the individuals employment roster
    - *Attending company meetings* – documented confirmation of meeting e.g. company emails, itineraries etc

- *Visiting Australian based clients* - documented confirmation of meeting e.g. company emails, itineraries etc

There are also circumstances that maybe outside of an individual's control that resulted in them traveling to Australia and spending more than 45 days in Australia.

This could include:

- **War & Conflict** – at any given time wars and conflicts are always occurring around the world and that may necessitate for an individual to temporarily relocate to Australia.
- **Pandemic** – like we saw during the Covid Pandemic many Australian citizens were temporarily trapped in Australia due to border closures and transport routes being temporarily closed.

We would recommend individuals who have experienced the above circumstances have their time in Australia excluded from a day count, up to a period of 183 days.

By employing the recommended Bright Line test in these circumstances should that individual not be able to return to their home country of domicile within a 183-day period then they would automatically qualify as a resident for Tax Purposes.

Question 3 - Factor tests

Could any of the four factors be defined differently to better achieve the design goals whilst remaining objective and identifiable?

The four factor tests recommended by the BoT do provide a reasonable basis for determining residency.

Broadly, we support the rationale behind the **Right to Reside Permanently in Australia, Australian accommodation, and Australian family tests,** however we believe that when it comes ascertaining whether an individual is a resident or not there needs to be a weighting or scoring system applied to the respective factors.

When applying the factor tests to determine residency it is very hard to argue that all factors remain equally as relevant as the other when determining whether the individual has commenced residency.

In considering the **Right to Reside Permanently in Australia** as a factor test, an individual who has an Australian passport does not prove they that commenced residency of Australia as equally as an individual whose immediate family resides in Australia (**Australian Family factor test**) or who owns a property in Australia that is untenanted (**Australian Accommodation factor test**).

According to the Australian Bureau of Statistics, in 2021 29.1% of Australia's population were born overseas meaning that at least one third of Australians hold two or more passports

when considering other individuals who were born in Australia but who have applied for citizenship in other countries due to either marriage or hereditary reasons.

Considering the **Australian Family** factor test more consideration needs to be considered with respect to Australian citizens who have returned to Australia to attend school, and specifically boarding school.

According to the Independent Schools Australia **Independent Boarding Schools Data Review 2011 to 2020**[2] in 2020 there were 6,630 overseas students attending independent schools.

Of those overseas students, 2,664 (40%) attended a boarding school and 3,966 (60%) attended non-boarding schools.

Many nationalities choose to send their children to school in Australia due to its high education standards and this includes Australian citizens living overseas.

Under the current proposal by the BoT if an Australian citizen were to send their children to an Australian boarding school, and that citizen was to breach the 45-day count recommended by the BoT, then they would be deemed an Australian tax resident as they also hold a Australian passport.

We would like to see an exclusion applied to the Australian family factor test for individuals under the age of 18 who are attending school where the parents are still resident overseas.

Under the proposed **Australian economic connections** test, this would be satisfied with a basic and very common scenario of a family renting out their family home upon departure.

When considered in conjunction with the tests, under the current proposed changes, a family who are Australian citizens who rent out their family home, but inadvertently spend more than 45 days in the year in Australia would be Australian tax residents.

For many of the reasons mentioned above this appears to low a threshold.

Maintaining an Australian business or Australian employment are strong factors of a maintained connection with Australia, whereas more passive investments such as rental property, particularly the family home are less indicative, unless the home remains vacant.

To summarise some suggested changes that would lead to a more appropriate outcome include:

- Taxable Australian property exclude a home that was a taxpayer's (or immediate family member's) main residence just before departure when considering the Australian economic connections test;
- Include a threshold (e.g. $1M) of taxable Australian investment property (excluding a property that was a main residence just before departure); or
- Relaxing the days threshold to 90 days as mentioned above

[2] https://isa.edu.au/wp-content/uploads/2022/04/ISA-Independent-Boarding-Schools-Data-Review-FINAL-1-July-.pdf

Question 4 - Factor tests

Are there other factors better suited to identifying individuals strongly connected to Australia in an objective, simple and certain way?

Notwithstanding the points made in Question 3 above, the following factors indicate a strong connection to Australia:

- Location of family pets
- Availability of significant personal use assets (cars, boat, caravan, holiday house)

Question 5 - Factor tests

How would any additional factors affect the proposed Factor Test, in particular the operation of the two-out-of-four aspect of the rule?

As currently drafted, the 2 out of 4 tests seems too low a threshold. As mentioned above, certain factors we would consider having a greater weight than others.

It may be more appropriate to split out some of the factors and make the threshold 3 instead of two. For example, the factors could be:

- The right to reside permanently in Australia test (as is)
- Australian accommodation test (as is)
- Australian employment
- Running an Australian business
- Being a director of an Australian company
- Being a trustee of an Australian family trust
- Being a member of a Self-Managed Superannuation Fund
- >$1M of taxable Australian investment property (excluding a property that was a main residence just before departure)
- >$250K Deposits in Australian banks or Australian shares
- Family pets remaining in Australia
- Availability of significant personal use assets (motor vehicles, caravan, holiday house)

Given some of these would clearly be weighted more heavily than others, a points-based system may be a more equitable outcome.

This could include points for every additional day over 45 days spent in Australia.

Question 6 - Commencing residency

Does having three points of connection (i.e., being physical present in Australia for more than 45 days in an income year, together with two factors) strike the right level of connection to commence residency?

For reasons specified above in 5. We believe an additional point of connection, or points factor test is more appropriate.

Question 7 – Ceasing short-term residency

Does maintaining two points of connection to Australia (i.e., meeting two factors) strike the right level of connection to maintain residency in income years during which an individual is physically present for less than 45 days?

In our view, the level of adhesion to Australian residency is excessive. Under the proposed tests, an individual who is an Australian citizen who rents out their family home upon departure, would fail this test as satisfying 2 factors of the factor test.

This would be the case even if they didn't spend 45 days in Australia.

It is not appropriate to rely on the overseas employment rule, as that rule is primarily to give certainty to employers.

In extreme cases this may result in individuals renouncing their Australian citizenship, permanent residence or selling their family homes to satisfy less than 2 tests.

We don't believe that either outcome is desirable for the benefit of Australia.

Question 8 – Ceasing short-term residency

If not, how should the Ceasing Short-Term Residency Rule operate to strike the appropriate balance between adhesive residency, certainty and simplicity?

For reasons outlined above in 3, 4 and 5, the trigger of 3 factors of our outlined broader factors would be more appropriate.

Question 9 - Ceasing long-term residency

Does the Ceasing Long-Term Residency Rule strike an appropriate balance between increasing adhesiveness of residency for individuals with enduring ties to Australia while also providing a clear pathway to non-residency?

In our view, the level of adhesion to Australian tax residency is excessive. Maintaining a 3-year adhesion to Australian tax residency is a significant departure from the current, longstanding principles.

Under the proposed approach, an individual who departs with their family for the foreseeable future, selling all their belongings, building a life overseas would remain tax resident for 3 years after departure, regardless of their intent and mode of life.

At best, this will cause an individual to seek guidance on the application of double tax agreements with the host country, adding complexity and compliance costs to outbound individuals.

Where income is subject to tax in both countries, with Australia having a different tax year to almost all other countries in the world, this creates significant administrative issues when completing foreign returns that straddle the Australian tax year to determine the applicable Foreign Income Tax Offset.

At worst, where the host country does not have a double tax agreement and no individual income tax, Australia would seek to tax foreign earnings that has no Australian source. This is an extremely inequitable outcome.

Question 10 – Temporary residents

Is it appropriate to only treat a 'temporary resident' as a long-term resident if they have been a tax resident for six or more consecutive years? (Note that other individuals will be treated as long-term residents if they have been a tax resident for three or more consecutive income years.)

We suspect there would be a small number of temporary residents who remain in Australia for more than 6 years, and as such it should not be a major consideration of any new rule change.

Question 11 - Overseas employment rule

The Overseas Employment Rule allows individuals with enduring connections to Australia to immediately cease being a tax resident, thereby reducing the tax and compliance burden for those individuals and their employers. Do the settings strike the appropriate balance between facilitating the skill development of Australians through international experience while maintaining sufficient integrity?

The Overseas Employment Rule can help simplify residency determination. Many of our clients are based in the Middle East, and as an industry norm in the region, employment contracts will be for a rolling 12 months, despite the expectation that the contract will be renewed and an intent by the taxpayer to reside outside Australia for what would otherwise be considered a permanent basis.

This simplified Rule will not benefit employers or individuals in such a position.

Question 12 - Overseas employment rule

The effect of the Overseas Employment Rule is to cause the individual to become a non-resident (and provide certainty for employees and their employers) rather than to exempt the overseas employment income. Is this the appropriate outcome?

Whilst having certainty of residency is helpful from the employer's perspective, it would also be helpful to have some certainty regarding principles for source of income as well, as it uncertain as to whether this income would be exempt from Australian tax, particularly where there is no double tax agreement with the host country.

Question 13 - Other matters

There will be a need for transitional rules when moving from the existing residency rules to the new framework. How would you suggest these transitional rules operate? For example, how should the Overseas Employment Rule apply to individuals who are already partway through their overseas employment at the time the new residency rules come into effect?

One way that the government could deal with this is to have an anti-detriment provision in the new law.

The idea would be that if a person could show to the satisfaction of the Commissioner that they were worse off due to the changes, the law could operate to put them in the same place as if the old law were still operative.

This anti-detriment provision could operate for a fixed period – say, three years.

Question 14 – Other Matters

Do you have any other insights or observations to make about the framework?

It is unclear how the part year residency objective in Chapter 8 of the BoT Report would apply in the case of the 183-day rule being satisfied.

For instance, an individual leaving Australia permanently on 1 February would have satisfied the 183-day rule and thus assumed to be a resident for the year.

Unless the rules applied a part-year residency approach then foreign income earned between 1 February and 30 June in that income year would likely be subject to Australian tax, particularly in the case the individual had moved to a country that does not have a double tax agreement with Australia.

The mere timing of a departure within the tax year should not be the determining factor as to whether such income is subject to Australia.