



Australian Government

The Board of Taxation

REVIEW OF THE INCOME TAX RESIDENCY RULES FOR INDIVIDUALS

Consultation Guide



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The Board's Review

The Board of Taxation (the Board) recently completed an independent, self-initiated review of Australia's individual income tax residency rules.

As a result of this review, the Board prepared a report '*Review of the Income Tax Residency Rules for Individuals*'.

This report is available on the [Board's website](#).

In the Board's view, there is a strong case for reforming the individual tax residency rules for modernisation – they are uncertain, impose an inappropriately high compliance burden and are perceived to be subjective.

While the Government has not taken a position on the Board's recommendations, it supports the Board undertaking this further consultation to ensure that any proposed residency rules can be appropriately designed and targeted, with a focus on the integrity of the existing and proposed residency rules.

In particular, the Government has asked the Board to consult further on its key recommendations, including how Australia could draw on residency tests in other countries.

The Board is now undertaking consultation on the design of new residency rules (recommendations 1 – 8 of the Board's report).

The Board intends to focus consultation on modernising the residency definition at this time. The Board will not be consulting on matters regarding recommendation 11, or matters it raised in Annexure B, during this consultation process. In particular, this consultation does not include matters involving the policy settings underpinning section 23AG of the *Income Tax Assessment Act 1936*.

With this Consultation Guide, the Board is seeking views on options for reforming the individual income tax residency rules.

Current Individual Income Tax Residency Rules

Four tests make up Australia's individual income tax residency rules.

Test	Description
Resides test	<p>A holistic review of a taxpayer's circumstances to determine whether the common law test of 'residency' is satisfied. Commonly perceived as a subjective test, balancing various factors including:</p> <ul style="list-style-type: none"> • the intention or purpose of their presence in Australia; • the family and business/employment ties; • the maintenance and location of assets; and • the social and living arrangements.
Domicile test	<p>A taxpayer is a resident of Australia even if they do not 'reside' in Australia under the first test (even without any intention to do so) but are nonetheless 'domiciled' in Australia, unless the individual's 'permanent place of abode' is outside Australia.</p>
183 day test	<p>A taxpayer is assumed to be a resident if they are in Australia for 183 days or more, unless the Commissioner is satisfied that the individual's 'usual place of abode is outside Australia' and, if so, the individual 'does not intend to take up residence in Australia'.</p>
Superannuation test	<p>A taxpayer is a resident if they are a member of certain Government superannuation funds, established under the <i>Superannuation Act 1990</i> or the <i>Superannuation Act 1976</i>. It also treats the spouse, or child under 16, of such a member as a resident.</p>

As can be seen, residency is not dependently solely on any one factor (eg, time). The nature and substance of an individual's connections are significant, as is the intention to reside. The Board's report, as well as the ATO's website and ruling guidance, provides more information on the existing residency rules. A simplified flowchart is attached (see Annexure B).

How the current rules create uncertainty

The different residency tests have evolved into a complex area of law. While it is clear for the majority of individuals whether they are residents, inbound and outbound individuals must evaluate a number of complex thresholds that are subject to significant judicial uncertainty.

The Board considers that this outcome is unsatisfactory. As the residency rules are a fundamental part of the income tax system, determining both an individual's tax base and rate, it is not appropriate that these tests, applicable to every individual, should be so complex. Simplification will improve certainty, reduce compliance costs and remove a potential barrier from Australia's attractiveness as an investment location.

The Board also identified some associated concerns. For example, the Board is aware of an integrity risk where high wealth individuals manipulate the residency rules to become 'residents of nowhere', resulting in the avoidance of tax in Australia. The Board also considers that the 'superannuation test' no longer achieves its policy objective.

Proposal for new residency rules

In the Board's *Review of the Income Tax Residency Rules for Individuals*, the Board outlined its preferred design for a new residency definition.

Objective

The current rules are fundamental to determining an individual's income tax base and rate, including whether foreign sourced income and capital gains are taxable in Australia. The Board proposes to adopt new rules using a principles based approach focusing on certainty, simplicity and integrity.

Modernising the rules will provide certainty for individuals.

Policy proposal

The current rules will be replaced by an improved and simplified residency test. Currently, the Board's preferred approach includes a series of design features for a new residency model. The framework outlined in the Board's report follows.

- **Policy statement**

A policy statement that provides legislative guidance on the parameters of individual residency.

Recommendation 3 of the Report

- **Primary test**

A primary bright-line test based on time spent (ie, a 'day count') to automatically determine the residency status of the majority of individuals. These tests will provide separate standards for inbound and outbound individuals.

Further consultation on the design of bright-line tests will include whether a bright-line test based on time alone is achievable in the Australian context and lessons from the New Zealand and United Kingdom experiences.

Recommendations 4 and 5 of the Report

- **Secondary test**

A secondary test taking into account individual circumstances, which may leverage some existing case law as well as international practices. This test may also apply differently for inbound and outbound individuals.

The potential for a legislated weighting mechanism for the relevant factors to provide greater certainty and simplicity in determining the outcome of the relevant test will be considered. This must have regard for the appropriate balance of certainty of outcomes, potential manipulation of outcomes and increasingly complex legislation.

Recommendation 6 and Observation 3 of the Report

- **Integrity measures**
Consider design options that ensure residents remain resident unless and until tax residency is established in another jurisdiction.
Recommendation 7 of the Report
- **Government officials posted overseas**
Identify options to update the superannuation test.
Recommendation 8 of the Report
- **Part-year residency**
Consider whether part-year rules will be necessary.
- **Transitional and other issues**
Consider any transitional consequences.

Other options considered

In the Board's review, a number of other ways of designing the test were considered. However, the Board prefers the proposed policy change to balance certainty and integrity when considering the connection with Australia required to be considered a resident for tax purposes. However, the Board welcomes submissions on other mechanisms.

Core design features

The Board prefers a new modernised residency definition that removes uncertainty, streamlining the rules while maintaining integrity. The Board seeks to consult on the following core design features identified in the Board's report.

1 Guiding principles

The Board has identified a number of guiding policy principles for designing new residency rules. These principles are:

- **Adhesive residency:** it should be harder to cease residency than it is to establish it. Generally, once sufficient time is spent in Australia, and their connections are sufficiently embedded, then it is appropriate that this level of engagement with and benefit from Australian society must be scaled back to a large extent before residency ceases. This is a feature that will be maintained from the existing rules, and reflects international practice.
- **Certainty:** the new rules should be designed to be straightforward and provide clear outcomes for the majority – there should be virtually no impact from this change in the majority of cases. However, unlike the current rules there will be clear thresholds for confirming residency.
- **Simplicity:** to remove uncertainty and complexity through clear, reasonable rules for determining residency for individuals with more complicated circumstances. This should balance the time spent in, and other connections with, Australia but in a way that removes the perceived subjectivity of the current rules.
- **Integrity:** the rules should not make it easier for individuals that have close ties to Australia to be able to game the system and not pay their fair share of tax in Australia. For example, a test based purely on time spent in Australia could be easily manipulated through simply achieving the relevant number of days over/under a threshold depending on the tax profile of any given year. This will need to be balanced against the aim of providing simple, clear rules.

These principles aim to achieve equity by applying equally to all individuals, while also improving economic efficiency by removing uncertainty and removing distortions. The development of the Board's preferred model that follows seeks to strike an appropriate balance between these principles.

2 Statement of individual residency policy

The Board recommended that the Government adopt a policy statement that provides legislative guidance on the parameters of individual residency.

The Board considers that the starting point for determining residency should be the extent of the individual's exposure to Australian society's economic, social and governmental infrastructure. Exposure to such benefits, through time spent in Australia and certain ties to Australian society, should ultimately lead to obligations arising from tax residency. That is, it is more than just a question of where one spends their time.

In the Board's report, the following matters we also identified:

- access to the privileges of Australian citizenship (or similar) – government infrastructure, security, medical and other services the Government provides to the individual;
- access to the Australian economy – the ability to access Australia's resources such as the capital market, a steadfast banking system, natural resources and the labour market; and
- other benefits of physical location in Australia – property (home) ownership and proximity to Australian goods, services and consumers.

This statement is not a legislative test – it would be an objects clause or theme statement in the style of the *Income Tax Assessment Act 1997* that encapsulates the principles underpinning the residency rules and the Government's policy intention.¹

For example, the Board's preliminary proposal is:

"Whether you are an Australian resident for tax purposes is based on both your time spent in Australia and the nature and quality of your ties to Australian society. The more substantial your ties to Australia, the more likely you will be a resident. This Division determines your residency status by considering the relevance of your ties and calculating your time spent."

The Board seeks to consult on how best to summarise the appropriate policy settings for individual tax residency.

¹ For more information, see the OPC Drafting Direction No. 1.8 page 12 regarding 'theme statements'.

Questions

1. Does the Board's proposed wording appropriately encapsulate the policy objective of ensuring that individuals with substantial ties should be residents?
2. The Board's report suggested that the statement should identify how the residency rules address the tax policy objectives of simplicity, equity, efficiency and integrity (in particular, the prevention of tax avoidance) to help taxpayers and the ATO understand whether taxation (or its absence) in any given context is a intended outcome or the result of tax avoidance.

Do you consider that this statement achieves this standard? If not, how may it more accurately do so?

3 Bright-line test

The Board's preferred design includes a primary test that provides a bright-line for most individuals to be able to conclusively determine their residency status. This will help those that are clearly residents and non-residents to identify the basis on which they may claim such status with certainty and manage their tax affairs accordingly.

This aligns with the Board's expectation that the majority of individuals will not be affected by the change, but should be given improved certainty. A bright-line test removes the more complex analysis of individual factors (as per the current tests) which should instead be reserved for more difficult residency cases. However, the Board would be interested in views from stakeholders on whether the straightforward tests below correctly balance simplicity, certainty and integrity.

The bright-line test will specify both automatic resident and non-resident status. In the Board's report, this is classified as 'inbound individuals' and 'outbound individuals' as the tests will be of most relevance to those either seeking to work out whether they have established or ceased residency. While these tests would apply to all individuals, this Guide will use the same parlance for consistency.

Inbound individuals

The inbound individual test determines whether an individual has automatically established residency. As noted in the Board's report, similar rules exist in the New Zealand and United Kingdom residency rules – however, this is not limited to those jurisdictions. It is a relatively common global standard.

The common standard is 183 days (being one day more than half a regular year). This is considered a reasonable proxy for determining whether an individual spends the majority of their time in Australia.

As noted in the Board's report, in order to guard against manipulation (eg, by staying in Australia for less than half of two separate income years in one 12 month period), the 183-day standard may be met by an individual if present in Australia for 183 days or more in any 12-month period.

An individual may then be a resident for that part of the first income year in which they were physically present, while the second year would be determined under the outbound individual bright-line test (below), the secondary test (factor-based) or perhaps via a split year treatment (see design principle 7).

Questions

3. To what extent does a bright-line test provide balance between certainty, simplicity and integrity? Are other measures needed to provide integrity – for example, those discussed under design principle 5?
4. Are there any other bright-line tests that you think should be included (whether as alternatives to a day count test, or in some form of combination)? For example, should you be a resident if:
 - a. Your only home is located in Australia; or
 - b. You work full-time in Australia.
5. Should an individual spending 183 days or more in any 12-month period in Australia spanning two income years be considered a tax resident in both periods?
6. What consequences (if any) will arise for the temporary residency and working holiday maker rules if these changes were adopted? How should these issues be addressed?

Outbound individuals

Many individuals that visit Australia, for business or leisure, should be able to conclude that they are not residents if they spend a very small amount of time in Australia. The Board's model will include a bright-line test to assist these individuals.

However, a guiding principle of the new residency rules is that residency is adhesive; that is, it is harder to cease than establish. This is a relatively common phenomenon across international comparisons. This will manifest in new rules in both the primary and secondary test. In the primary test, the rules will adopt a lower bright-line threshold for those who have previously been a resident compared to a non-resident.

In addition, the Board also considers it appropriate to provide for individuals who are working full-time overseas to be non-residents in certain circumstances. This will remove tax uncertainty as a barrier for Australian businesses sending individuals overseas for work.

The Board's report, at paragraph 1.212, sets out certain potential day counts that may be considered as part of the consultation. The Board is primarily interested in feedback regarding the

structure of the proposed bright-line tests, including how the specific days test should apply (ie, is it an annual test, should there be different thresholds for inbound versus outbound individuals etc.).

In light of the above, the following table outlines the Board's preferred model.

Bright-line test	Description
Previously a resident	An individual that was previously a resident of Australia is a non-resident if they spend less X number of days in Australia
Previously not a resident	An individual that has never been a resident of Australia is a non-resident if they spend less than Y number of days in Australia (where Y is greater than the X number of days required for those previously a resident, in line with the adhesive principle)
Working overseas	An individual that works full-time overseas is a non-resident if they spend less than a certain number of days working, or a larger number of days in total, in Australia

The Board seeks views on whether, similar to the inbound individual test, these thresholds should apply on a 12-month period basis (with associated part-year considerations) or per income year. Further, the Board is considering whether days should be counted as an average over a longer period.

The Board's report outlined certain international comparisons from which the above diverge – the New Zealand and United Kingdom bright-line tests.

In New Zealand, the 'permanent place of abode' test overrides the 183-day bright-line test. This is similar to the existing Australian domicile and 183-day tests. This has not been adopted in the Board's preferred model as it undermines the simplicity and certainty the proposed model seeks to provide. However, acknowledging the potential revenue impact and integrity risks of a pure 183-day non-resident test, the proposed model is adhesive with differentiated bright-lines. The Board is interested in feedback as to whether the bright-line strikes the right balance.

These tests are similar to the UK bright-line tests, but they have been adapted and simplified by the Board for an Australian context.

Questions

7. Are there any other bright-line tests that you think should be included? For example, should you be a non-resident if your only home is located outside of Australia?
8. Do the proposed day-count tests appropriately balance simplicity and integrity? Is it too complex? Alternatively, are other measures needed to provide integrity – for example, those discussed under design principle 5?
9. Should the outbound individual test apply over a 12-month period, per income year or on some other basis? Why?
10. How does this test interact with the limited foreign employment income tax exemption (section 23AG of the *Income Tax Assessment Act 1936*)?

4 Factor test: determining the level of connection to Australia

Under the Board's preferred approach, where an individual does not satisfy any of the bright-line tests, they must apply a secondary test, called the 'factor test' for these purposes.

The purpose of this test is to determine the connection an individual has to Australia. Each factor indicates a level of connection – that is, for each factor an individual satisfies, they can be considered to have a higher level of connection to Australia.

The preferred model seeks to adopt a single list of relevant factors. This will replace the variety of existing tests with a single test based on a limited list of objective factors that reflect matters materially relevant to residency. This will be a significant simplification and improvement from the current residency rules.

Importantly, these factors should be sufficiently clear such that individuals will generally be able to work out whether or not they have satisfied any given factor.

Factor	Description
Time spent in Australia	<p>A factor is satisfied if an individual spends sufficient time in Australia:</p> <ul style="list-style-type: none"> – A set number of X days or more if previously a resident; and – A larger set number of Y days or more if never an Australian resident. <p>Both tests would be less than 183 days for the factor to be useful (otherwise the individual would automatically be a resident). The number of days for an individual previously a resident should also be lower than a non-resident, in line with the adhesive principle.</p>
Immigration status	A factor is satisfied if the individual is an Australian citizen or permanent resident
Family	A factor is satisfied if an individual's family (or relevant social grouping) is largely located in Australia
Australian accommodation	A factor is satisfied if an individual has readily accessible Australian accommodation (owned or rented) that the individual actually uses throughout the income year
Economic ties	A factor is satisfied if an individual has substantial Australian economic ties (such as employment or business interests)

As noted in the Report, these factors reflect many of the key issues considered relevant in Australian case law and by the ATO. However, in order to provide greater certainty for individuals, the number of factors have been reduced and simplified. It is hoped that the simplicity adopting the above five factors will be supported by providing clear guidelines for when they are satisfied – the Board seeks views on this.

The Board's report also referred to the OECD standards (permanent home; personal and economic relations (centre of vital interests); habitual abode; and nationality). While the above factors may not be identical, there is some consistency between these methodologies.

Questions

11. Are the factors proposed for the secondary test the most appropriate factors?
12. Are there any key matters that should be adopted in preference to, or addition to, the listed factors? For example:
 - a. the length of a taxpayer's stay in a single overseas country;
 - b. the answers on immigration forms upon arriving or departing Australia;
 - c. whether a taxpayer established a home (in the sense of dwelling, house or other shelter that is the fixed residence of a person, a family, or a household), outside Australia;
 - d. the duration and continuity of a taxpayer's presence in the overseas country outside of a single income year;
 - e. whether a taxpayer informs government departments such as the Department of Social Security of leaving permanently and stopping social security payments (ie, family allowance payments);
 - f. whether accommodation in Australia has been effectively abandoned (ie, the extent to which accommodation is actually available).
13. What level of 'economic ties' should be necessary for the factor to be conclusively determined? For example:
14. maintaining bank accounts in Australia;
15. maintaining an ABN in Australia;
16. directorship of an Australian company (or other entities such as a self-managed super fund);
17. the level of investment in Australia (both passive and active);
18. compliance with any other residency requirements for the purposes of making or maintaining investments (ie, whether a foreign investment application is required by the taxpayers).
19. What level of connection to accommodation should be required to satisfy the Australian accommodation factor?
20. To what extent should a person's personal and social ties be located in Australia to satisfy the Family factor?
21. At what level should the resident and non-resident 'time spent' factor be set (ie, how should they interact with the primary bright-line test for outbound individuals)? Should they be spread over a medium term (ie, 2 to 3 years)?
22. What should be necessary to satisfy any of the other factors?

Weighting for inbound and outbound individuals

In order to conclude whether an individual is a resident or non-resident, there will be a mechanism designed that reflects the individual's level of connection to Australia. In the Board's report, the following mechanisms were proposed:

- an individual could require a certain number of points to be regarded as either a resident or a non-resident; or
- in a similar manner to the UK's statutory residency test, an individual could require a number of 'ties', being a set number of significant factors that lead to a conclusion of either resident or non-resident.

Consultees suggested that weighting increases transparency and simplification and ensure individuals can consistently apply their facts and circumstances without the need for specialist advice.

However, the Board's report emphasised the risk of an increasingly complex mechanism. It noted that the UK's statutory residence test was not preferred as given its complexity.

In light of this, the Board seeks views on conceptualising the relevance of factors to inbound and outbound individuals.

The Board's preliminary view is as follows:

- if a taxpayer was a resident in the preceding income year, a set number of X or more factors must be satisfied to establish residency;
- if a taxpayer was not a resident in the preceding income year, a higher set number of Y or more factors must be satisfied to establish residency.

While this approach does not include a 'points' style test, the two approaches are broadly analogous.

The Board observes that this approach adds complexity to the bright-line test, but also acknowledges that, if not appropriately balanced, the new tests may be open to manipulation and arbitrary outcomes.

Questions

23. Are the outcomes fair and equitable? If no, please elaborate.
24. An individual working overseas may automatically be a non-resident, but under the secondary test would likely have otherwise been a resident. Does this interaction provide appropriate results?
25. In the UK a stepped approach to 'ties' is adopted – the Board considers this adds additional complexity. Does the Board's approach balance simplicity with integrity in the absence of this tiered approach?
26. Would a 'points' style approach be more easily accessible and understood? Does the different approach make a material difference?

Tax treaties

There may be an opportunity to align domestic tax residency with residency under Australia's double tax treaties. As these concepts are currently not aligned, where an individual is a resident under Australia's domestic tax laws, but not a resident under a relevant double tax treaty, then the individual is taxed in Australia only on income to which Australia has taxing rights (generally Australian sourced income) but the individual has access to residence-based concessions (such as the tax free threshold and the CGT discount). This inconsistency creates arbitrage and adversely impacts the equity of the income tax system.

In Canada, a similar concept is inserted within the bright-line test. Broadly, an individual in Canada for 183 days (or more) will not be deemed a Canadian resident if they are also a resident of another country under a Canadian tax treaty – their residency status must be determined through a fact-based test. Further, if the 'tie-breaker' clause of the tax treaty considers the individual a resident of the other country, then the individual is deemed a non-resident.

The Board seeks views on whether a similar approach may be adopted in Australia.

Questions

27. Should the new residency rules include a provision to align domestic and treaty residency for dual residents, eliminating potentially inconsistent outcomes?

Further design features

A number of further design features are also required to ensure integrity and that appropriate outcomes can be achieved. While some of these issues were identified in the Board's report, consultation is sought on a number of key design matters.

5 Integrity: resident of nowhere

An anti-avoidance rule will be designed to address residency manipulation and equity concerns of individuals being a 'resident of nowhere'.

Ceasing Australian residency means that an individual is no longer subject to tax on their worldwide income. This is generally appropriate under the residence and source based international tax system.

However, for high-wealth individuals this principle may be manipulated to obtain tax advantages. For example, as outlined in the Board's report, where an individual becomes a non-resident but has not established tax residency in another jurisdiction, that individual can become a 'resident of nowhere'. This arrangement may be entered into, even over a short-time period, where a large income payment or capital gain is expected to arise.

There are also instances of individuals being able to effectively obtain tax residency in a jurisdiction without income tax, or substantial income tax, or with an income tax holiday to induce a change in tax residency.

These integrity concerns need to be considered and where appropriate specifically addressed and eliminated in the new residency rules. Of course this must be balanced against any potential heightened uncertainty or complexity that may be imposed – this will necessarily depend on the measurement of the risk of adverse revenue impacts.

However, to the extent that the new rules make it easier to work out individual residency, it will be important to guard against any potential short-term gaming that may allow otherwise taxable income, profits or gains to become exempt from Australian tax.

In the Board's report, the suggested approach is that where an individual has been an Australian resident and would otherwise satisfy the conditions to become a non-resident, the change in status will only be effective if the individual can demonstrate that they have established residency in another country. That is, individuals remain Australian residents unless and until tax residency is established in another jurisdiction.

The way in which an individual demonstrates residency is a complex design issue. The Board is considering a number of alternatives to improve the integrity of the new residency rules, including a number based on international comparisons.

Satisfying the Commissioner

One way of addressing integrity issues with individuals leaving Australia would be to require the active contemplation or satisfaction of the Commissioner before an individual can cease residency by confirming and assuring a new country of residence has been established. This may be achieved through requiring some form of certification, or through a legislative requirement akin to the existing residency rules of the Commissioner to form a view (such as the 183 day test). This is practically achieved through self-assessment and subsequent review, in the same way as any other review of a taxpayer's affairs.

While this may provide the Commissioner with the legislative authority to ensure that individuals are changing residency, it largely undermines the guiding principles of simplicity and certainty, which may outweigh the integrity benefits.

Spain: targeted deemed residency rules

In order to address circumstances in which individuals cease residency with an intention to reduce their tax obligations, an integrity rule could increase the cost of doing so, and thus reduce the incentive to manipulate residency to avoid Australian tax.

For example, Spain has sought to address this risk by adopting a low-tax jurisdiction targeted integrity rule. Where Spanish residents seek to accredit their new residence to a country or territory that the Spanish Government has determined to be a 'tax haven', the individual does not lose their status as a Spanish resident for income tax purposes for five years (ie, the rule applies in the year the change of residence occurs and the next four tax periods).

This approach would provide certainty through listing the targeted jurisdictions but would actively discriminate against certain jurisdictions. This would only be appropriate should it be conclusively determined that individuals are avoiding paying their fair share of tax by adopting these strategies in these jurisdictions.

Reducing the tax advantage: alternative minimum tax

An integrity rule could be designed to adopt the concept of an alternative minimum tax on worldwide income for a set period after residency ceases (for example, five years). This is similar to the Spanish example, but substitutes the tax haven requirement with a proxy to calculate inappropriate levels of income tax.

For example, where the tax burden on an individual for a period after which they have ceased residency is less than a set percentage of their foreign income and non-taxable Australian gains,

the individual would be required to pay the difference between the foreign tax and the set alternative minimum tax rate. This would be subject to double tax treaties.

An approach of this kind would ensure certainty by removing any jurisdictional bias or subjective intention threshold, merely adopting a mechanism to impose a minimum level of tax the Government considers appropriate for individuals that have recently ceased residency.

There may be consequences for certain CGT rules (eg, CGT event I1).

United Kingdom: temporary absence rules

A rule could be adopted to impose tax on income and gains that arise during short term absences from Australia. In essence, this rule targets schemes that rely on brief periods of non-residency where the individual never intends to actually cut ties with Australia.

In the UK, temporary non-residents are charged to tax on specified income and gains (in particular, capital gains, distributions from closely controlled companies, certain pensions or lump sum payments etc.). A temporary period of non-residence is:

- where an individual was previously a ‘sole’ UK resident and subsequently does not have sole UK residence (ie, the sole requirement meaning the individual is not a non-resident and not a foreign resident under a double tax treaty);
- in the immediately preceding 7 tax years, 4 or more must have included a period in which the individual was a ‘sole’ UK resident; and
- the period of non-residence is 5 years or less.

Upon resuming residency, the individual is required to pay tax on the relevant income and gains.

An approach of this kind in Australia would provide certainty by simply adopting a rule that eliminates the incentive to become a non-resident for a short period of time simply for tax reasons. It also likely reduces collection difficulties that may arise for the measures outlined above.

While it will also impact Australian expatriates should they spend up to 5 years abroad by imposing tax upon their return, it would be expected that any foreign employment income would be excluded from such a tax.

Schemes to establish residency

It is possible that individuals may seek to establish residency in Australia to obtain access to the tax free threshold. It is not proposed that the new rules would address any such issues – the Board is not generally aware of prevalent schemes to establish residency and it is expected that this may

be due to the wider implications of tax on global (worldwide) income of residents. This may neutralise, or outweigh, any potential tax benefits.

However, there are tax measures other than the tax free threshold where residency status is also relevant (eg, the CGT discount, certain CGT roll-overs, CGT main residence exemption, certain withholding taxes, etc.). The Board seeks views on the accuracy of the above assumption regarding worldwide income given these types of tax measures, and whether there are any arrangements to resume residency (or establish dual residency) for a period of time to access certain resident-only concessions.

Questions

28. Other than the resident of nowhere phenomenon, what other arrangements that should be taken into account when designing an integrity rule for residency?
29. Which of the options described best guard against short-term gaming that may allow otherwise taxable income, profits or gains to become exempt from Australian tax under either the current or proposed rules?
30. Are you aware of any arrangements which primarily seek to take advantage of resident-only tax outcomes? If so, please explain.

There are also more fundamental shifts in income tax policy that may address integrity issues that arise for manipulating residency. While these are more significant than the above integrity rules, they are included for context and completeness. The Board is interested in views about whether these policy settings may be more appropriate.

United States: citizens and permanent residents standard

The rules may deem residency for certain individuals regardless of their circumstances. In the United States, citizens and permanent residents are subject to tax on their worldwide income regardless of residency, where citizens must renounce their citizenship, or permanent residents relinquish this status, to change this result (although this rule is subject to double tax treaties). It relies on foreign tax credit rules to ensure relief from double taxation is provided domestically on a credit basis. This mechanism broadens the tax base and is arguably a simple, yet effective method, to address the integrity concern to a significant extent.

Alternatively, an option that links double tax treaties to residency may be preferred. This option is similar to 'provably' establishing in another jurisdiction, using concepts more familiar to the Australian legal system rather than importing foreign legal requirements. This could feasibly involve extending treaty-like conditions for individuals in non-treaty jurisdictions to ensure that the burden to cease residence is clearly identifiable; however, this may extend treaty benefits inappropriately to jurisdictions do not impose income tax.

United Kingdom: remittance taxation

The rules could be supplemented by some form of alternative taxation method for certain individuals, in order to provide a mechanism by which tax is collected but without increasing the complexity of the residency rules

In the UK, a resident non-domicile remittance taxation system complements the statutory residency test. . Generally, it reduces an incentive to achieve non-resident status by adopting a remittance, rather than arising, basis of taxation for foreign income and gains of resident non-domicile individuals – that is, foreign income and gains are only taxable in the UK when remitted. There are also further rules that further complicate the remittance regime based on the concept of ‘ordinarily resident’.

This would be a significant divergence from existing policy settings, but provides a clear distinction from the US approach. It would require additional complexity and significant drafting resources, and may not address the fundamental issue of changes in residency status to achieve non-taxation.

Questions

31. Do you think that a strict citizen-based residence test or a remittance based regime would improve the income tax system and/or complement new residency rules?

6 The superannuation test: options for reform

In the Board's report, the Superannuation test was identified as outdated, as it only applies to Commonwealth officials and their families where the official is a member of certain closed Government superannuation funds. As the last fund closed in 2005, it is expected that the number of officials not covered will continue to grow.

The test was designed to ensure that Australian government employees working on behalf of the Australian Government abroad (eg, foreign affairs and trade officials, civilian defence officials), their spouses and children under 16 years of age, are treated as Australian residents. The Government imposes tax on the worldwide income of these individuals.

This is a well-documented feature of the international tax system. Most, if not all, countries deem Government officials working offshore to be tax residents; however, not many countries also deem the spouses and dependents of officials to be residents (examples provided at Annexure C). The Board expects that it would be appropriate to update the superannuation test to align with common international practice and reflect the original intention of these rules. The following table outlines key design considerations.

Individual	Description
Government official	<p>Employees carrying out any function at the behest of the Australian Government should be covered by this test. This should extend to officials of all levels of government (local, state, federal) but not cover locally engaged staff or contractors.</p> <p>There may be a need to consider whether certain contractors should qualify, to cover certain functions; however, this may depend on the way in which particular Government functions are in fact carried out.</p>
Government functions	<p>Generally, it is expected that any function carried out by the Government should be covered by this test. Any consideration of limiting Government functions will unnecessarily increase complexity; however, some form of assurance will be appropriate to prove the nexus between government and the function.</p> <p>Some of Australia's tax treaties limit the scope of government functions in this regard – this could be reflected in the test or left as a treaty overlay to avoid over-complication.</p>
Spouses and dependants	<p>As this particular category of resident is not aligned with broader international practice, it is possible that the test should only apply to the Government official. The residency tests would apply to their families as they do to all other individuals.</p>

Consistency with tax treaty policy

Taxing government official remuneration in the source country is reinforced through double tax treaty practices. A government services article is a longstanding feature of the OECD model tax convention, providing sole taxing rights to the country by which the remuneration is paid (subject to an exception broadly applicable to locally engaged staff).

All of Australia's tax treaties have such an article. While the scope varies depending on the treaty, they have generally become more closely aligned with the OECD model over time.

This article only applies to remuneration paid by Australia – it does not apply to worldwide income. This means that a government official's foreign sourced income will remain taxable in the source jurisdiction, and the government official is still subject to the applicable tax treaty residency 'tie-breaker' rules.

Theoretically, if a government official were to 'tie-break' to the other country they would be subject to foreign tax but also obtain the benefits of Australian resident tax rates (ie, tax free threshold, CGT discount, main residence exemption). Practically, however, it is difficult to envisage a scenario in which an Australian government official would be considered to have closer ties to another country such that they would not tie break to Australian residency.

It is possible that, given broad international treatment to deem officials to be residents for domestic law purposes, that this theoretical outcome is considered highly unlikely and that most countries would expect officials to remain both domestic and treaty residents for the duration of any posting.

Questions

32. Do the proposed design considerations capture the appropriate Government officials and functions? If not, what else should be considered?
33. Do any of the international comparisons provide a clear guide for reforming the superannuation test?
34. Should the residency rules continue to deem spouses and dependants of Government officials to be Australian residents?

7 Part-year residency

Generally, the existing residency rules apply on a full-year basis.

There is a limited basis on which tax residency can be quarantined to a limited part of an income year (noted bases are the rule for a part-year tax-free threshold, which applies independently of the residency rules and the apportioned CGT discount for foreign residents). There is otherwise some uncertainty as to how residency ceases, or ends, at any given time throughout the income year.

As part of the new residency rules, the Board considers that it would be advantageous to align the part-year rules for the tax-free threshold with the residency rules in general if this can be done with relative simplicity. The following design features are considered desirable by the Board.

Feature	Description
Commencement date	The commencement date for residency should generally be the date upon which an individual arrives in Australia having not previously been a resident of Australia.
End date	The end date for residency should generally be the last day in which an individual is in Australia in an income year, where that individual was a resident for the entire previous income year.

Under the secondary test, an individual may cease or establish residency by a method other than time spent in Australia. While it may be possible to design rules that align to the date on which a given factor is no longer met, this will likely increase complexity and uncertainty of the new rules, and therefore a simple presence-based test is preferred.

This simplicity may be maintained by testing each period (that is, (a) prior to arrival and post-arrival, and (b) prior to departure and post-departure) as notionally separate income tax periods.

It is possible that this may provide planning opportunities, and the Board seeks views about whether this is appropriately balanced by integrity rules (see above) and the application of the bright-line test of 183 days to any given 12-month period.

Questions

35. Should the new residency rules include part-year residency provisions? Should there be different part-year provisions for inbound and outbound individuals?
36. Do the above design features provide a reasonable mechanism to determine split year income periods?
37. How might part-year rules interact with Australia's double tax treaties?

8 Transitional rules

The Board is considering the need for transitional arrangements in the event that there are any adversely affected individuals.

Generally, as the most significant changes are intended to target inbound and outbound individuals (to improve certainty and simplicity), it is expected that the rules will operate prospectively from a commencement date.

Some of the proposed rules are designed differently depending on whether an individual was previously a resident or not. Generally, this will require an individual to use the current residency rules to determine their residency, which may lead to uncertainty and potential for dispute. The Board seeks views on the likelihood of this scenario and whether there is a simple way of resolving this issue.

Questions

38. Should there be any transitional relief for any affected individuals? If so, please identify the affected type of individuals and relevant relief.

Expected impacts of the proposed change

The Board has identified the following expected impacts of the proposed change to its preferred residency rules.

Issue	Observation
Revenue impact	This measure is intended to have an immaterial or negligible revenue impact, but is subject to the policy decisions ultimately taken.
Economic impact	The Board's proposal seeks to provide certainty for individuals (and employers) regarding every individual's residency status. The Board expects that this increased certainty will aid Australia attracting inward investment and may lead to broader economic benefits.
Compliance burden impact (red tape)	While the Board expects that there will be some upfront cost to advisers and employers modifying their systems and educating staff on the Board's proposal, over time the compliance burden should drastically reduce, including the need for external advice. This measure should be considered to reduce red tape.
Administrative impact	The implementation of, and transition to, the Board's proposal will require some investment in the ATO's systems and efforts regarding education and public guidance. It is expected that the increased certainty should, however, reduce the costs of ongoing monitoring and drastically reduce need for private rulings or likelihood of costly litigation.
Impact on affected individuals	The Board's proposal seeks to provide certainty and reduce the compliance burden for individuals and their employers that current exists. It is expected that the majority of individuals will be unaffected by the transition to the Board's proposal – there will be no noticeable impact and no cost. However, it is likely that there will be some individuals affected by a change in residency status under both the proposed substantive rules and potential integrity measures. The Board cannot quantify this impact but it is expected to be minimal. Further, as the key changes are for inbound and outbound individuals it is expected that should the Government adopt the Board's proposal the impact will be foreshadowed without any retrospective application.
Other impacts	The Board does not expect that its proposal will have any impact on human rights or other matters required to be considered through the Government's regulatory impact statement procedure.

Consultation process

As part of the Board's consultation, the Board is seeking views on options to reform and the design of the Board's proposed options from its *Review of the Individual Income Tax Residency Rules*.

Timetable for consultation

The timetable below sets out an indicative timeframe for consultation. Further information will be made available at: www.taxboard.gov.au.

September 2018	Consultation Guide – released
September – October 2018	Consultation
	<p>Written submissions in response to the Consultation Guide may be provided to the Board until 26 October 2018.</p> <p>The Board's working group will conduct targeted consultation with interested parties.</p>
November 2018	Final Report
	The Board will provide its final report to Government in November.

How to participate

Interested parties may contribute to consultation through online submissions or by participating in one of the consultation sessions conducted by the Board.

Written

The Board invites interested parties to make written submissions until Friday 26 October 2018. Submissions can be made to taxboard@treasury.gov.au or addressed to the Board of Taxation as follows:

Board of Taxation Secretariat | The Treasury – Sydney Office
 Level 5, 100 Market Street
 Sydney NSW 2000
taxboard@treasury.gov.au
 Phone: (02) 6263 4366

Submissions should address the design features and answer questions outlined in this discussion paper (a full list of questions is at Annexure A). While the Board's consultation focuses on modernising the residency definition at this time, and it is not consulting on matters regarding recommendations 9 to 11, or matters it raised in Annexure B, during this consultation process, consultees may address recommendation 9.

In person

Please contact the Board on the above details if you wish to be consulted.

Providing a confidential response

All information (including name and address details) contained in formal submissions will be made available to the public on the Board of Taxation website, unless it is indicated that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain confidential should provide this information marked in a separate document.

A request made under the *Freedom of Information Act 1982* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Annexure A: Summary of questions

Policy statement

1. Does the Board's proposed wording appropriately encapsulate the policy objective of ensuring that individuals with substantial ties should be residents?
2. The Board's report suggested that the statement should identify how the residency rules address the tax policy objectives of simplicity, equity, efficiency and integrity (in particular, the prevention of tax avoidance) to help taxpayers and the ATO understand whether taxation (or its absence) in any given context is a intended outcome or the result of tax avoidance.

Do you consider that this statement achieves this standard? If not, how may it more accurately do so?

Bright-line test

3. To what extent does a bright-line test provide balance between certainty, simplicity and integrity? Are other measures needed to provide integrity – for example, those discussed under design principle 5?
4. Are there any other bright-line tests that you think should be included (whether as alternatives to a day count test, or in some form of combination)? For example, should you be a resident if:
 - a. Your only home is located in Australia; or
 - b. You work full-time in Australia.
5. Should an individual spending 183 days or more in any 12-month period spanning two income years be considered a tax resident in both periods?
6. What consequences (if any) will arise for the temporary residency and working holiday maker rules if these changes were adopted? How should these issues be addressed?
7. Are there any other bright-line tests that you think should be included? For example, should you be a non-resident if your only home is located outside of Australia?
8. Do the proposed day-count tests appropriately balance simplicity and integrity? Is it too complex? Alternatively, are other measures needed to provide integrity – for example, those discussed under design principle 5?
9. Should the outbound individual test apply over a 12-month period, per income year or on some other basis? Why?
10. How does this test interact with the limited foreign employment income tax exemption (section 23AG of the *Income Tax Assessment Act 1936*)?

Secondary test

11. Are the factors proposed for the secondary test the most appropriate factors?

12. Are there any key matters that should be adopted in preference to, or addition to, the listed factors? For example:
 - a. the length of a taxpayer's stay in a single overseas country;
 - b. the answers on immigration forms upon arriving or departing Australia;
 - c. whether a taxpayer established a home (in the sense of dwelling, house or other shelter that is the fixed residence of a person, a family, or a household), outside Australia;
 - d. the duration and continuity of a taxpayer's presence in the overseas country outside of a single income year;
 - e. whether a taxpayer informs government departments such as the Department of Social Security of leaving permanently and stopping social security payments (ie, family allowance payments);
 - f. whether accommodation in Australia has been effectively abandoned (ie, the extent to which accommodation is actually available).
13. What level of 'economic ties' should be necessary for the factor to be conclusively determined? For example:
 - a. maintaining bank accounts in Australia;
 - b. maintaining an ABN in Australia;
 - c. directorship of an Australian company (or other entities such as a self-managed super fund);
 - d. the level of investment in Australia (both passive and active);
 - e. compliance with any other residency requirements for the purposes of making or maintaining investments (ie, whether a foreign investment application is required by the taxpayers).
14. What level of connection to accommodation should be required to satisfy the Australian accommodation factor?
15. To what extent should a person's personal and social ties be located in Australia to satisfy the Family factor?
16. At what level should the resident and non-resident 'time spent' factor be set (ie, how should they interact with the primary bright-line tests)? Should they be spread over a medium term (ie, 2 to 3 years)?
17. What should be necessary to satisfy any of the other factors?
18. Are the outcomes fair and equitable? If no, please elaborate.
19. An individual working overseas may automatically be a non-resident, but under the secondary test would likely have otherwise been a resident. Does this interaction provide appropriate results?

20. In the UK a stepped approach to 'ties' is adopted – the Board considers this adds additional complexity. Does the Board's approach balance simplicity with integrity in the absence of this tiered approach?
21. Would a 'points' style approach be more easily accessible and understood? Does the different approach make a material difference?
22. Should the new residency rules include a provision to align domestic and treaty residency for dual residents, eliminating potentially inconsistent outcomes?

Integrity: resident of nowhere

23. Other than the resident of nowhere phenomenon, what other arrangements that should be taken into account when designing an integrity rule for residency?
24. Which of the options described best guard against short-term gaming that may allow otherwise taxable income, profits or gains to become exempt from Australian tax under either the current or proposed rules?
25. Are you aware of any arrangements which primarily seek to take advantage of resident-only tax outcomes that have been legislated in recent years? If so, please explain.
26. Do you think that a strict citizen-based residence test or a remittance based regime would improve the income tax system and/or complement new residency rules?

The superannuation test: options for reform

27. Do the proposed design considerations capture the appropriate Government officials and functions? If not, what else should be considered?
28. Do any of the international comparisons provide a clear guide for reforming the superannuation test?
29. Should the residency rules continue to deem spouses and dependants of Government officials to be Australian residents?

Part-year residency

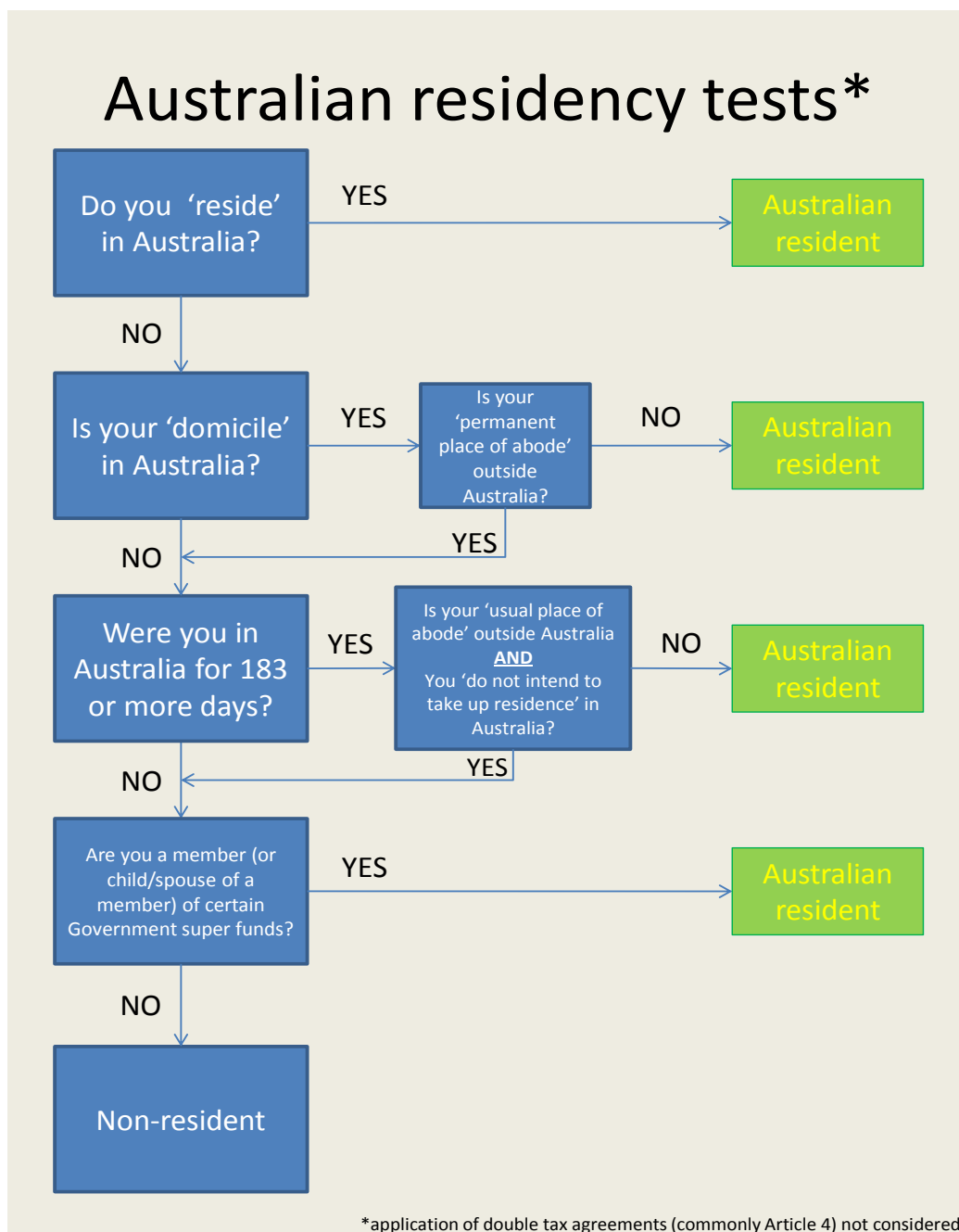
30. Should the new residency rules include part-year residency provisions?
31. Do the above design features provide a reasonable mechanism to determine split year income periods?
32. How might part-year rules interact with Australia's double tax treaties?

Transitional rules

33. Should there be any transitional relief for any affected individuals? If so, please identify the affected type of individuals and relevant relief.

Annexure B: flow chart of existing rules

The following flow chart offers a simplified explanation of the current income tax residency rules for individuals.



Annexure C: international approaches to Government employees working offshore

The following table provides a high level overview of the nature of individual tax residency in certain overseas jurisdictions and the way in which Government officials are treated for income tax residency purposes.²

Country	Tax residency test	Government services test
<i>Jurisdictions in the International Comparison of Australia's Taxes (2006)</i>		
Canada	Facts and circumstances – high reliance on residential 'ties' (supplemented by a 183 day test)	Government services posted outside Canada are usually factual residents of Canada or deemed residents of Canada for income tax purposes.
Ireland	Facts and circumstances – reliance on time present only (183 day test and 280 day cumulative 2-year test) or election to be tax resident	No specific rule (although Government pensions and income from an Irish public office are taxable/sourced in Ireland)
Japan	Facts and circumstances – high reliance on time present and domicile	Individuals being a national or local government official serving abroad are deemed to have a domicile in Japan as long as he or she is a Japanese national.
Netherlands	Facts and circumstances – high reliance on residential ties	<p>Individuals with Dutch nationality, employed by the Dutch government transferred abroad, are treated as tax residents.</p> <p>This includes those transferred to work abroad in diplomatic functions or within the context of a tax treaty that has been concluded by the Netherlands.</p> <p>This regulation also applies to partners and children of transferred persons. The children must be younger than 27 years old and supported to a considerable extent by the transferred person.</p>

² This table has been prepared based on publicly available information and OECD Common Reporting Standard submissions by relevant jurisdictions.

Country	Tax residency test	Government services test
New Zealand	Facts and circumstances – high reliance on residential ties (supplemented by a 183 day test)	An individual sent away from New Zealand in the service of the government in any capacity, is considered to be a tax resident of New Zealand and liable for New Zealand tax on worldwide income. The length of absence and permanent place of abode in New Zealand do not matter. This rule doesn't apply to a spouse, partner or children who may be accompanying the individual.
Spain	Facts and circumstances – high reliance on time present and residential ties (183 day test), with targeted tax haven integrity rules	Individuals with Spanish nationality carrying out official work abroad whose usual residence is abroad (eg, members of diplomatic missions, public officers etc.), along with their spouses and children who are minors, are subject to payment of Personal Income Tax, with two exceptions: <ul style="list-style-type: none"> – Individuals who are not civil servants and whose usual residence was already abroad before any of the aforementioned circumstances arose. – When the usual residence of their non-legally separated spouse or children who are minors was abroad before any of these circumstances arose.
Switzerland	Facts and circumstances – high reliance on time present and residential ties (deeming rules of 30 days of gainful activity and 90 days without)	Government officials or individuals working for a public law corporation or institution who live outside the territory of Switzerland and are in this jurisdiction subject to a partial or total income tax reduction remain liable to taxation in Switzerland.
UK	Statutory Residency Test – high reliance on time present and 'ties'	An individual who works abroad as a Crown Servant, pays Income Tax in the UK on income from their job for the Crown as if they live in the UK. The rules apply regardless of UK residency status for tax, no matter how long abroad, where they work or how settled they are.
US	Citizenship and facts and circumstances – permanent residents, citizens and aliens that satisfy the 'substantial presence test' which is time reliant	Government civilian employees' income tax filing requirements are generally the same as those for citizens and residents living in the United States. Taxed on worldwide income but may receive certain allowances and deductions.

Country	Tax residency test	Government services test
<i>Other CRS jurisdictions</i>		
Andorra	Facts and circumstances – high reliance on time present (183 day test and supplementary ties based test)	Natural persons with Andorran nationality, along with their spouses not legally separated and children under 18 years whose usual residence is abroad due to their condition of members of diplomatic missions or representatives at international organisations are Andorran residents.
Argentina	Citizenship and facts and circumstances – citizens, permanent residents and those with a sufficient ties	Individuals are resident: <ul style="list-style-type: none"> – Persons of visible existence who are abroad and act as official representatives within the National State or in the performance of the duties entrusted by the National State, the Provinces or Municipalities or the Autonomous City of Buenos Aires. – Civil servants of Argentine nationality who perform their duties at international agencies of which the Argentine Republic is a member state.
Bulgaria	Facts and circumstances – high reliance on time present (183 day test)	Individuals who reside abroad on assignment of the Bulgarian State, its authorities and/or its organizations, or Bulgarian enterprise, and also the members of his/her family
France	‘Domicile’ test – facts and circumstances test with high reliance on ties	State agents carrying out their duties or on assignment in a country where they are not liable to income tax on all their income are deemed French tax residents.
Germany	Facts and circumstances – high reliance on residential ties (also a 6-month prima facie rule)	Unlimited tax liability also applies to German nationals whose residence or habitual abode is not in the Federal Republic of Germany but who work as public servants and are paid wages from German public funds and who, together with the family members belonging to their household, are subject only to limited income tax liability in the country where they have their residence or habitual abode (section 1 (2) of the Income Tax Act).

Country	Tax residency test	Government services test
Greece	Facts and circumstances – reliance on residential, social and economic ties (supplementary rule similar to Australian 183 day test)	Consular or diplomatic or public official of similar status or public servant having the Greek nationality and serving abroad are Greek tax residents.
South Korea	Facts and circumstances – high reliance on holding an address and days present.	Public officials or residents working overseas, or executives or employees dispatched to places of business abroad of a domestic corporation or foreign subsidiaries (limited to cases where an investing domestic corporation has invested directly or indirectly 100/100 of the total issued equity stocks or equity investment shares), etc. shall be deemed as residents (Article 3 of Enforcement Decree of the Income Tax Act)

Annexure D: About the Board of Taxation

The Board of Taxation is an independent advisory board, charged with contributing a business and broader community perspective to improving tax policy, legislative design and the administration of Australia's tax system.

The Board also comprises three ex-officio members, being the Secretary to the Treasury, the Commissioner of Tax, and the First Parliamentary Counsel.

The Board advises the Treasurer, Treasury Portfolio Ministers and the Treasury. It consults widely to fulfil its role as the key interface between business and community stakeholders and the Government on tax policy.

Chair



Michael Andrew AO
Former Global
Chairman
KPMG

CEO



Karen Payne
Former Partner
Minter Ellison

Ex-officio members



Philip Gaetjens
Secretary
The Treasury



Chris Jordan AO
Commissioner
ATO



Peter Quiggin
First Parliamentary
Counsel



Mark Pizzacalla
Senior Partner
BDO



Julianne Jaques
Barrister
Victorian Bar



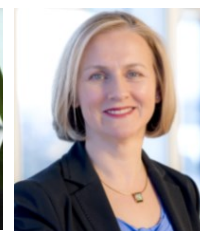
Neville Mitchell
Director
Sonic Healthcare,
Sirtex Medical,
Osprey Medical



Craig Yaxley
Senior Partner
KPMG



Ann-Maree Wolff
Head of tax
Rio Tinto



Rosheen Garnon
Former National
Managing Partner -
Tax
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