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Submission from the Tax Justice Network Australia on Review of the Income Tax Residency Rules for Individuals

26 October 2018

The Tax Justice Network Australia (TJN-Aus) welcomes this opportunity to make submission on the Review of the Income Tax Residency Rules for Individuals. The TJN-Aus is aware that there are businesses that market for wealthy individuals to use arrangements to escape having to make any tax contributions to the well-being of communities anywhere in the world, while free-riding off the benefits provided by the societies in which they do business.

The TJN-Aus notes that the business Tax Free Today, that seeks to assist wealthy people in avoiding paying tax anywhere, rates Australia as currently one of the hardest countries to escape tax residency from.¹ They advise their clients to obtain a second residence arguing “The visa or residence permit can help you in this situation, as can having a home, paying Social Security tax, having a car, contracted local services, stamps in your passport... Every detail counts.” They argue “if you live by the philosophy of the Perpetual Traveller, without spending more than four months anywhere (and without applying for residence in that country) you can live a **tax-free life**, completely free.”² They further advise “not having a physical address can be a problem in certain cases. The easiest alternative is to use the address of a friend or family member.”³

Policy statement

1. Does the Board’s proposed wording appropriately encapsulate the policy objective of ensuring that individuals with substantial ties should be residents?

The proposed wording appears to be an appropriate statement to encapsulate the principles underpinning residency rules.

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?

The statement would appear to achieve the intended standard.

Bright-line test

¹ Tax Free Today, ‘How to transfer your tax residence and legally avoid taxes with the 183 day rule’, 18 October 2018, <https://tax-free.today/blog/how-to-transfer-your-tax-residence-183-day-rule/>

² Tax Free Today, ‘How to transfer your tax residence and legally avoid taxes with the 183 day rule’, 18 October 2018, <https://tax-free.today/blog/how-to-transfer-your-tax-residence-183-day-rule/>

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- 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?**

The bright-line test provides simplicity and certainty, but, as the Board recognises, on its own it is too easy for an unethical person to manipulate and get around. Thus, there is a need for further assessment to determine residency based on the nature of the ties a person has to Australia.

The TJN-Aus notes that Ireland spreads the residency test across the current and previous financial year, so that a person is a tax resident if they spent 280 days in Ireland across the two years, of which at least 30 days were spent in Ireland in each year.

- 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.**

Yes, it would make sense to include tests such as if your home is located in Australia and if your full-time work is in Australia as further tests of a persons residency being 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?**

Yes, as this would make it harder for those seeking to artificially claim their residency is elsewhere to be able to do so.

- 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?**

The factors put forward by the Board are appropriate for a secondary test of residency. The UK test for a home appears to offer a simple test, that a person is a tax resident of the UK if they have a home in the UK for over 90 days and lived in it for at least 30 days.

- 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;**

The factor would appear too easy to get around, if the person is willing to lie on the immigration forms.

- 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;**

This factor would be relevant, but it would then depend on how much time the person spends living at this place of residence compared to how much time they spend living in Australia.

- d. **the duration and continuity of a taxpayer's presence in the overseas country outside of a single income year;**

This could be another relevant factor.

- 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);**

This would appear too easy a test for a person to manipulate, especially if the tax benefit of not being determined to be an Australian resident outweighs the benefit of social security payments (which for high net worth individuals is very likely to be the case).

- 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).**

These would be relevant factors to determining that the person has an economic tie to Australia, in addition to the level of income derived from Australia.

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?**

A test that could be used here is if the person's spouse spends 183 days in a 12 month period in Australia.

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)?**

From an integrity point of view, it would be better if the 'time spent' factor was spread over three years, to make it harder to artificially get around the rule.

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?**

An aim should be to align domestic and treaty residency for dual citizens, provided that this does not open an opportunity for a person to be able to artificially achieve the outcome of being a non-resident through the use of the tax treaty, when the other tests for tax residency would have made them an Australian for tax residence purposes.

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?**

The second option of requiring a person to pay a minimum level of tax after they are assessed to be a non-resident of Australia for five years would appear to offer the greatest integrity safeguard. However, there would need to be an opportunity to appeal to the Commissioner that the change in residence is legitimate and not an artificial arrangement to avoid paying tax. For example, a person moving to Singapore to live and work there on a full-time basis.

At the same time, TJN-Aus believes where a foreign jurisdiction is wilfully providing tax residency as an artificial arrangement to assist a person in not paying tax in Australia, the Commissioner should have the power to deem that the person maintains residency for Australian tax purposes on an on-going basis with no expiry until the person can demonstrate they have legitimately changed their residency.

The TJN-Aus notes that in the case of Ireland a person pays tax on their income for three years after that they have stopped being a tax resident of Ireland, except on the following forms of income:

- Income from trades or professions operating outside of Ireland;
- Income from employment (excluding self-employment) that takes place in its totality outside of Ireland;
- Other foreign income, provided the amount is below €3,811.

- 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 TJN-Aus note that Nomad Capitalist, who advises people on how to “gain independence from your government”, suggests that the US citizenship rule makes it easier for a person to not have to pay taxes to the US government than the current regulatory regimes that exist in Australia, Canada and Norway.⁴

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?**

⁴ Andrew Henderson, ‘Get second residency and pay no tax in these 18 tax-free countries’, Nomade Capitalist, 22 February 2017, <http://nomadcapitalist.com/2015/09/07/tax-free-countries-second-residency/>

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?

It is desirable to be able to have part-year residency, but such an arrangement should not allow the other residency tests to be undermined. Where a person genuinely works in Australia for part of year and then moves to a foreign location to work, the fair principle would be that they pay tax in Australia on the income they earned while working in Australia and then are taxed in the foreign location on the income they earn there. However, where the person seeks to artificially shift their tax residency for part of a year to avoid paying tax in Australia, then they should continue to pay tax in Australia. The problem is making sure the tests for tax residency are robust enough to distinguish between the genuine working situation and the artificial arrangement.

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.

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Background on the Tax Justice Network Australia

The Tax Justice Network Australia (TJN-Aus) is the Australian branch of the Tax Justice Network (TJN) and the Global Alliance for Tax Justice. TJN is an independent organisation launched in the British Houses of Parliament in March 2003. It is dedicated to high-level research, analysis and advocacy in the field of tax and regulation. TJN works to map, analyse and explain the role of taxation and the harmful impacts of tax evasion, tax avoidance, tax competition and tax havens. TJN's objective is to encourage reform at the global and national levels. The Tax Justice Network aims to:

- (a) promote sustainable finance for development;
- (b) promote international co-operation on tax regulation and tax related crimes;
- (c) oppose tax havens;
- (d) promote progressive and equitable taxation;
- (e) promote corporate responsibility and accountability; and
- (f) promote tax compliance and a culture of responsibility.

In Australia the current members of TJN-Aus are:

- ActionAid Australia
- Aid/Watch
- Anglican Overseas Aid
- Australian Council for International Development (ACFID)
- Australian Council of Social Service (ACOSS)
- Australian Council of Trade Unions (ACTU)
- Australian Education Union
- Australian Manufacturing Workers Union
- Australian Nursing & Midwifery Federation
- Australian Services Union
- Australian Workers Union, Victorian Branch
- Baptist World Aid
- Caritas Australia
- Centre for International Corporate Tax Accountability and Research
- Community and Public Service Union
- Electrical Trades Union, Victorian Branch
- Evatt Foundation
- Friends of the Earth
- GetUp!
- Greenpeace Australia Pacific
- International Transport Workers Federation
- Jubilee Australia
- Maritime Union of Australia
- National Tertiary Education Union
- New South Wales Nurses and Midwives' Association
- Oaktree Foundation
- Oxfam Australia
- Save the Children Australia
- Save Our Schools
- SEARCH Foundation
- SJ around the Bay
- Social Policy Connections
- TEAR Australia
- The Australia Institute
- Union Aid Abroad – APHEDA
- UnitedVoice
- Uniting Church in Australia, Synod of Victoria and Tasmania

- UnitingWorld
- Victorian Trades Hall Council
- World Vision Australia