Moving to a more 'certain' test for tax residence: Lessons for Canada?

[A working paper]

Michael Dirkis*

Abstract

In 2013 the United Kingdom introduced statutory residence rules for individuals after a stop/start reform process that spanned some 77 years. The rules contained in 159 sections of complex legislation consisting of detailed definitions (e.g., of what constitutes a 'day' or a 'home', etc.), and extensive specific anti-avoidance rules (many focused on countering actions to avoid the scope of the defined terms) remove all subjectivity. In Australia in 2018 the Board of Taxation has concluded that Australia's existing residency rules are no longer appropriate as the fundamental basis of individual income taxation. The Board considers the rules must be modernised. They recommended:

- that the new resident definition should include separate definitions for individuals establishing residency and ceasing residency:
- each definition should commence with a simple bright line 'days count' test that ensures the vast majority of individuals can determine their residency quickly and with certainty; and
- for individuals that do not satisfy either bright line test, an objective test based on the individual's facts and circumstances should then apply to determine residency on the basis of specific key factors (to determine the individual's connection or relationship to Australia).

It concludes that these bright line tests be based on the New Zealand and United Kingdom residency rules. This paper explores the impact of such objective tests on equity and efficiency, whether there are other models in other jurisdictions that could be considered and whether there are advantages in the adoption of similar bright-line tests in other countries which have subjective tests such as Canada.

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1. Introduction

A comprehensive review of Australia's residence and source rules was completed in 2004 by this author.[1] That review established that Australia's residence rules for individuals were inadequate in their practical application when judged against the four tax policy objectives of equity, efficiency, simplicity and the prevention of tax avoidance, particularly in respect of simplicity and the prevention of avoidance. In attempting to determine if the individual residency rules could be modified within the jurisdictional framework to more closely meet these objectives, it reviewed the laws of other jurisdictions against those objectives. In particular, it examined the individual residence rules operative in common law countries that tax through a single code (Canada, New Zealand and the United States), common law countries that operate on a schedular tax system (Ireland and the United Kingdom) and the European civil law countries (France and Germany).[2] That review concluded that the 'individual fact and circumstances' element of the individual residence tests in Australia and internationally could, in certain situations result in horizontal inequity, give rise to the lack of simplicity and leave the rules open to manipulation.[3]

As the laws of both Australia and Canada remain unchanged since 2004 this paper does not seek to update nor reproduce that study. Rather, after first recapping the similarities of the operative rules in both Canada and Australia and their common weaknesses, it is focused upon critically examining the recent developments in the United Kingdom and Australia. The conclusions may inform any current or future debate on possible reform to Canada's individual residence rules.

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1 Michael Dirkis, *Is it Australia's? Residency and source analysed* Research Study No 44, Australian Tax Research Foundation (2005), Specifically Ch 3 examining individual residency.

2 Ibid, Part IV, An Overview. This approach allows for comparison of the various hierarchies of residency tests adopted in each country within the three jurisdictional types, which cannot be demonstrated by merely evaluating the broad categories of residency rules for individuals used world-wide.

3 Ibid, Part VI Conclusions. It is important to note that although the facts and circumstances element of the tests does cater for an individual's circumstances, individual facts and circumstances does not equate to horizontal equity.

2. Australia's and Canada's individual residence tests: the rules and weaknesses

2.1 Canada's individual residence tests

The terms 'resident' and 'ordinarily resident' have been used in Canadian income tax law since the enacting of Canada's first income tax in in 1917,[4] However, despite the term resident being used more than 400 times[5] in the *Income Tax Act* (Can),[6] leaving aside deeming provisions, neither the term resident, nor the term ordinarily resident, are defined. Thus, the Canadian tax law relies principally on the common law to determine residency of individuals on the basis that they are resident or ordinarily resident in Canada.[7] The source jurisdiction for interpreting these rules appears to be United Kingdom case law. [8]

Although the outcome under common law is ultimately determined by an individual's facts and circumstances, the Canada Revenue Agency in administrating the law states that:

> The most important factor to be considered in determining whether an individual leaving Canada remains resident in Canada for tax purposes is whether the individual maintains residential ties with Canada while abroad.[9]

Although the concepts ordinarily resident (i.e. where a taxpayer has a settled routine of life, regularly, normally or customarily lives)[10] and resident have a different meaning at common law, under the Canadian tax law a person who is ordinarily resident is deemed to be a resident.[11]

The *Income Tax Act*[12] also deems persons to be residents if they:

- "sojourn" in Canada for more than 183 days in a year;[13]

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4 Under s 4(1) of the Income War Tax Act 1917 (7-8 George V. Chap. 28) tax was payable by 'every person residing or ordinarily resident in Canada or carrying on any business in Canada'.

5 Edwin Kroft, 'Jurisdiction to Tax: An Update' (1993) *Canadian Tax Foundation Corporate Management Tax Conference papers* 1:6.

6 *Income Tax Act* R.S.C., c.1 1985, (5th Supplement).

7 *Thomson v Minister of National Revenue* [1946] DTC 812.

8 Ibid. All four judges who reviewed legal precedents (Kerwin, Taschereau, Rand, and Estey JJ) considered the United Kingdom cases of *Commissioners of Inland Revenue v Lysaght*, [1928] AC 234 and *Levene v Commissioners of Inland Revenue* [19281 AC 217.

9 Canada, Canada Revenue Agency, *Income Tax Folio S5-F1-C1, Determining and Individual's Residence Status*., para 1.10.

10 It covers former residents who have not severed all links with Canada see – *McFadyen v The Queen* [2000] DTC 2473. Also see Jack Bernstein and Kay Leung, 'Who is Ordinarily Resident in Canada?' (2001) 22 *Tax Notes International* 1309 and Jack Bernstein and Kay Leung, 'News analysis: CCRA updates residency guidance' (2002) 26 *Tax Notes International* 260.

11 *Income Tax Act* RSC C 1985, s 250(3).

12 The fundamental concepts underlying the rules can be traced back to 1927 – see Kroft, supra n 5, 1:6. They were last modified in 1999 – see Bernstein and Leung (2001), supra n 10.

13 *Income Tax Act* RSC C 1985, s 250(1)(a).

- are members of Canadian Forces[14] or overseas Canadian Forces school staff[15] or their dependent child;[16]
- are an ambassador, high commissioner, minister, agent-general or other Canadian or provincial government official or their dependent child;[17]
- are participants in certain international aid projects or their dependent child;[18] or
- are persons exempt under a tax treaty because they were related to, or a family member of, a Canadian resident individual.[19]

Finally, where a person fulfils the residency requirements under the *Income Tax Act* but is deemed under the tie breaker test in a tax treaty to be a resident in another state, the person is treated as non-resident for tax purposes.[20]

2.2 Australia's individual residence tests

A statutory definition of resident came into effect on 1 July 1930 following Australia's adoption of worldwide (residence based) taxation.[21] These residence rules had their genesis in the recommendations of the Australian 1920 Royal Commission on Taxation[22] and their design was influenced by the 1920 United Kingdom *Royal Commission on The Income Tax*[23] and the British common law. A definition of resident, similar to the current resident definition in s 6(1) of the Income Tax Assessment Act 1936 (Cth) (ITAA 1936) was enacted in 1930.[24]

The term 'Australian resident' is currently defined in s 995-1 of the Income Tax Assessment Act 1997 (Cth) (ITAA 1997) as a person who is a resident under the 1936 Act. The statutory definition 'resident or resident of Australia' in s 6(1) of the ITAA 1936 consists of a 'resides' test and three statutory tests.[25]

The resides test is the primary or common law test, which classifies an individual as a resident if he or she can be said to be actually 'residing in Australia' (i.e., '[i]f a person is in fact residing in Australia then, irrespective of his nationality, citizenship or

14 Ibid s 250(1)(b).
15 Ibid s 250(1)(d.1).
16 Ibid s 250(1)(f).
17 Ibid s 250(1)(c) and (f).
18 Ibid s 250(1)(d) and (f).
19 Ibid s 250(1)(g).
20 Ibid s 250(5).
21 Section 4 of the Income Tax Assessment Act 1922 (Cth) (ITAA 1922) was amended by ss 2(a) and (i) of the Income Tax Assessment Act 1930 (Cth) (Assented to on 15 August 1930) to substitute a new definition of 'assessable income' (which extended the scope of assessable income to include 'in the case of a resident - the gross income derived from all sources…' and to insert a definition of 'Resident' or 'Resident of Australia'.
22 Commonwealth, Royal Commission on Taxation, *Reports* (1920-24) (the 1920 Royal Commission), 108.
23 United Kingdom, *Report of the Royal Commission on the Income Tax* Cmd 615 (1920), 9.
24 The s 6(1) definition in the 1936 Act is practically identical to the original definition enacted by the Income Tax Assessment Act 1930 (Cth), except for the superannuation test (s 6(1) definition (a)(iii)), which was added by the Income Tax Assessment Act 1939 (Cth). The subsequent changes to the s 6(1) definition (a)(i) only reflect changes to the Commonwealth's superannuation scheme named in s 6(1) definition (a)(iii).
25 There also exists a definition of 'temporary resident' in s 995-1 of the 1997 Act and the undefined term 'ordinarily resident' is used in ss 23AA, 251U(1)(e), and 252A(2A)(b) of the ITAA 1936.

domicile, he is to be treated as a resident for the purposes of the Act').[26] Given the United Kingdom origins of the 'resides' test it is not surprising that, like Canada, there continued to be reliance on those British decisions in interpreting the meaning of the word resides.

The first two statutory tests, which originate in the 1930 definition, are the so called 'domicile' test[27] and the 'more than half year' or '183 day' test.[28] They were aimed extending residency to individuals who may not reside in Australia in terms of the primary test.[29] Both tests are subject to qualifications aimed at limiting their scope to avoid possible double taxation.[30]

In 1939 a third statutory test was enacted, the so-called 'superannuation' test.[31] It was enacted to bring within the Australian taxable field the salaries paid to locally engaged High Commission staff that who had recently been extended the benefits of the then Commonwealth superannuation scheme.[32] It has been subject to subsequent changes since 1939 to reflect the introduction of new Commonwealth superannuation schemes. It is not a Government service test per se as it only applies to persons in the named schemes, It is also important to note that the scope and relevance of the superannuation test has been dramatically reduced as both schemes have been

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26 Commonwealth, Explanatory Notes, Bill to Amend the Income Tax Assessment Act 1922-1929 (Cth), 9.

27 The 'domicile' test is in ss (a)(i) of the definition and treats as a resident 'a person- (i) whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia.' Its purpose was intended to place public officials located abroad in the same position as foreign public officials representing their governments in Australia - see ibid Explanatory Notes, 10. The Government had identified that the High Commissioner for Australia in London did not pay tax in Australia as services were rendered outside Australia; they were exempt from British income tax and received the general exemption available to residents on their Australian source income.

28 The 'more than half year' or '183 day' test is in ss (a)(ii) of the definition and treats as a resident 'a person- … (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia.' The test was introduced for the purpose of obviating the difficulties in establishing if a person is a resident in any country – see ibid Explanatory Notes, 11. This exception was enacted (in the absence of tax treaties in 1930) to reduce the possibility of the double taxation by ensuring that the visitors were not treated as residents.

29 Ibid Explanatory Notes, 9.

30 The 'domicile' test does not apply where a person has established a permanent place of abode elsewhere. The purpose for the introduction of the rebuttal was to ensure that persons who had abandoned their Australian residence would not continue to be treated as residents. Such a protection was crucial at the time as, in the absence of tax treaties, those persons would have been potentially subjected to double taxation in respect of the income earned in their new place of residence- see ibid Explanatory Notes, 10.

The 'more than half year' test will not apply if the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia. The qualification was introduced (in the absence of tax treaties) to reduce the possibility of the double taxation by ensuring that the visitors were not treated as residents (i.e., '... no danger of treating as residents persons who are purely visitors') - see ibid Explanatory Notes, Note on Clause 2, 11.

31 The 'superannuation' test was in ss (a)(iii) of the definition was added by the Income Tax Assessment Act 1939 (Cth)). Under this provision a person who is either a member of the superannuation scheme established by deed under the Superannuation Act 1990 (Cth) or an eligible employee or for the purposes of the Superannuation Act 1976 (Cth) (the "named schemes") is deemed to be a resident. The spouse or a child under 16 years of age, of such a person is also deemed by that relationship to be a resident under the test.

32 See Commonwealth, *Parliamentary Debates*, House of Representatives*,* 21 September 1939, 964 (Sir Percy Spender, Assistant Treasurer).

closed to new participants and the impact of fund choice introduced by the Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 (Cth).[33] The Act generally enables employees, from 1 July 2005, to choose the complying superannuation fund to which their employers are required to make compulsory superannuation contributions.[34]

2.3 Overview of the weaknesses in Australia's and Canada's individual residence tests

As stated above, in highlighting the common weaknesses of the individual residence rules this paper does not intend to repeat the comprehensive review undertaken in 2004.[35] Rather it seeks to highlight the key features which fail the four tax policy objectives of equity, efficiency, simplicity and the prevention of tax avoidance.

As with many jurisdictions Canada and Australia rely upon indirect (in the case of Canada) and direct individual facts and circumstances tests/requirements (such as resides, domicile, ordinarily resident, and place of abode). The Canadian rules rely on the common law to determine the meaning of the undefined term 'residing' and then deem them to be residing if they satisfy the common law concept of 'ordinarily resident'. Further, where the deeming definitions exist, terms within those deeming rules, such as 'sojourn' and 'day', are not defined. The word 'sojourn' in residence tests is unique and therefore has an uncertain meaning and is not used in statutes in other countries.

Similarly, the Australian the individual residence definition contains a number of words which required, and continue to require, interpretation by the Courts. These words and phrases are 'resides in Australia', 'domicile',[36] 'permanent place of abode', 'usual place of abode', and 'does not intend to take up residence'.

Although it is claimed that the fact and circumstances tests are more '... compatible with the political theory that government power comes from the consent of the governed,'[37] they do not satisfy a number of the policy objectives. As minor variations in a taxpayer's circumstances may result in taxpayers in similar circumstances being taxed differently the horizontal equity criterion is not met under such facts and circumstance tests. Second, fact and circumstance tests will generally fail the simplicity criterion. The case by case determinations of all key concepts means the rules can give rise to arbitrary outcomes, impose high compliance costs, create

33 This Act was introduced on 26 June 2002 as Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002.

34 Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 (Cth), Secs. 32C(1), (3) (4) and 32NA(2)(a).

35 Dirkis, supra n 1 Ch 3.

36 Although, the general common law concept of domicile was received from the United Kingdom upon settlement, it has been modified in Australia by uniform state and federal legislation: Domicile Act 1982 (Cth), Domicile Act 1979 (NSW), Domicile Act 1981 (Qld), Domicile Act 1980 (SA), Domicile Act 1980 (Tas), Domicile Act 1978 (Vic), Domicile Act 1981 (WA) and Domicile Act 1979 (NT). These Acts abolish the rule of dependent domicile of married woman (s 6), abolish the rule of revival of domicile of origin (s 7), and define when capacity to have independent domicile exists (s 8), however, they do not actually define domicile.

37 Michael McIntyre, *The International Income Tax Rules of the United States* (2nd ed, 1992) 1-21.

uncertainty and be hard to administer.[38] Finally, as the tests rely upon individual facts and circumstances they are easy to manipulate, and they generally fail the tax avoidance criterion.

Australia's Board of Taxation in its August 2017 (the Board's 2017 Report) report to the Australian Treasurer concluded that Australia's individual residency rules:

> impose an inappropriate compliance burden on many taxpayers with relatively simple affairs as the rules are inherently uncertain to apply, include outdated concepts and rely on a 'weighting' system that leads to inconsistent outcomes, which also gives rise to integrity risks.[39]

Further, both countries' half year tests require presence (sojourn) in the jurisdiction for more than 183 days in a year (in the case of Canada) and more than one-half of the year of income (in the case of Australia). However, Australia's test fails to satisfy the equity criteria due to the exclusionary glosses that excuse individuals where the Commissioner is satisfied that they have a 'usual place of abode elsewhere', and 'do not intend to take up residence'. As noted above, these facts and circumstance glosses can result in horizontal inequity as taxpayers in similar circumstances can be taxed differently, while the facts and circumstance elements of the Australian test fail the simplicity criterion. This is also a problem for Canada's use of the term sojourn, as discussed above.

Also the measurement for residency under Australia's the 183 day test being an income year (i.e. 1 July to 30 June) results in the test failing to satisfy the specific criterion of prevention of tax avoidance as taxpayers could spend up to 364 days in Australia without satisfying the 183 day test provided the 182 days were prior to 1 July and balance were from 1 July.[40] Thus, the 183 day test fails the tax avoidance criterion as specific classes of persons can easily avoid the test.

It has been argued that such arbitrary day tests often only catch taxpayers who are unsophisticated, unadvised,[41] unlucky (an individual taxpayer being deemed a resident due to a tail wind causing the taxpayer to arrive half an hour earlier)[42] or poor

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38 Peter Whiteman et al (eds), *Whiteman on Income Tax* (3rd ed, 1988), 137.

39 Board of Taxation, *Review of the Income Tax Residency Rules for Individuals* (2017) (released 9 July 2018) (the Board's 2017 Report) <https://cdn.tspace.gov.au/uploads/sites/70/2018/07/T307956-income-tax-res-rules.pdf>. The Board of Taxation is a non-statutory advisory body that provides the Government with real-time advice on tax policy issues by contributing a business and tax community perspective to improving the design and operation of taxation laws.
This finding by the Board is at odds with the Canada, Report of the Royal Commission on Taxation (1966) Vol 4, 541 (Carter Commission) that recommended '… residence continue to be the principal basis for determining liability to tax, largely because residence seems to imply a closer association than citizenship between the taxpayer and the use of services provided by a taxing jurisdiction.'

40 Arthur Andersen, *Working Overseas* (c 1988), 4 noted that this measurement rule provides a major tax planning opportunity, particularly for expatriate experts employed in Australia in their first and last year of their assignment.

41 See Brian Arnold and Michael McIntyre, *International Tax Primer* (1995), 21.

42 Clinton Alley and Duncan Bentley, 'In Need of Reform? A Trans-Tasman Perspective on the Definition of 'Residence'' (1995) 5 *Revenue Law Journal* 40, 52 cites as an example the case of an unlucky taxpayer (a university lecturer) who arrived on day 365 of his absence due to a tail wind, thereby

planners (where the taxpayer did not take into account that time period covered a leap year).[43]

Finally, the Canadian rules contain a series of tests deeming all manner of civil servants and their children to be residents. These government service tests are driven by a political/national imperative and, if widely drafted as in Canada, do create horizontal equity between all government workers (i.e. government workers in similar economic circumstances are treated similarly). However, they perpetuate horizontal inequity between those workers and all other non-resident workers employed by the non-government sector. Though, the government service tests do generally satisfy the simplicity criterion as the rules apply in a predictable way, are not complex, result in low compliance costs, and are expressed clearly. The government service tests also meet the "co-ordinated with other tax rules" element of the simplicity criterion, as they are consistent with the government service rules in most tax treaties.

In contrast, Australia's superannuation test, which was not devised as a government service test, lacks horizontal equity as it applies inconsistently to public servants (only those who are members of the prescribed schemes) and to the spouses and children of those public servants (as it deems them to be residents regardless of the degree of actual connection between the employee and his or her spouse and children). The rule also appears to amount to discrimination based upon marital status.

In summary both the Australian and the Canadian individual residence tests to some degree fail the four tax policy objectives of equity, efficiency, simplicity and the prevention of tax avoidance.

3. The United Kingdom's changes

After almost 200 years without a definition of residence for individuals and reliance on the jurisprudence that constitutes the common law resident test[44] the United Kingdom in 2013 adopted a statutory definition of residence for individuals.[45] The changes were also to done in conjunction with reforms to ordinary residence. It was achieved after a stop/start reform process that spanned some 77 years.[46]

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retaining his residence in New Zealand. Unfortunately the judgment in *Case F138* (1984) 6 NZTC 60,237; *TRA Case 21* (1984) 8 TRNZ 140 does not record this fact.

43 In *Wilkie v Inland Revenue Commissioners* [1952] 1 All ER 92; (1951) 32 TC 495 a taxpayer was found not to be resident for more than six months in a leap year (365 days) as he had been present for only 182 days and 20 hours.

44 As noted by Dixon J in *Gregory v Deputy Commissioner of Tax (WA)* [1937] HCA 57; (1937) 57 CLR 774,777 the principles were first settled in *Attorney-General v Coote* (1817) 4 Price 183.

45 See s 218 and Schedule 45 of the Finance Act 2013 (UK), which received royal assent on 17 July 2013.

46 The process leading to codification of the residence test began in 1936 and finally, after many false starts, on 23 March 2011, progress was made with the United Kingdom Government in its 2011 Budget Report announcing (at para 1.136) its intention to introduce a statutory definition of residence from 6 April 2012. On 17 June 2011 HM Treasury and HM Revenue and Customs (HMRC) released *Statutory definition of tax residence: a consultation* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/81588/consult_condoc_statutory_residence.pdf> which also included options for the reform of ordinary residence and overseas workday relief and a second consultative paper *Reform of the taxation of non-domiciled individuals* (2011) <http://www.hm-treasury.gov.uk/consult_nondom_tax_reform.htm>. In a Ministerial Statement

3.1 Policy

HM Treasury and HM Revenue and Customs (HMRC) on 17 June 2011 claimed that that the process of reform which restarted on 23 March 2011 was being driven by the Government's commitment '… to introducing a statutory test that is transparent, objective, and simple to use'.[47] Similarly the HM Treasury and HMRC claimed in a statement on 21 June 2012 that the process was driven by a '… desire … that the rules for determining whether an individual is tax resident in the UK should be clear, objective and unambiguous.'[48] However, despite these claims that simplification and clarity were the main drivers for change there were other non-simplification drivers for the change. The first was a desire to reverse the Supreme Court 2011 decision in the Gaines-Cooper case.[49] In *Gaines-Cooper* the Supreme Court found that a taxpayer was resident in the United Kingdom under the law despite the taxpayer appearing not to be a resident under the HMRC's practice.[50] There was also a desire to close a number of opportunities for tax minimisation. A clear policy diver underlying the change was to ensure that once residency is obtained it is very difficult to lose that residence.[51]

3.2 Overview of the legislation

The new 'statutory residence test' consist of a 'basic rule'[52] which states that a person will only be a resident if they satisfy the either the 'automatic residence test'[53] or the

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issued 06 December 2011, the Exchequer Secretary to the Treasury advised that a number of 'detailed issues' were raised in the consultation, therefore, this Test would be delayed until the Finance Bill 2013, to be effective April 2013. It was noted that any reforms to 'ordinary residence' would also be made at this time. On 21 March 2012 the Budget 2012 confirmed that, effective 6 April 2013, the Government would introduce a statutory definition of tax residence and that it would publish a summary of responses to the consultation together with draft legislation for comment (para 2.51). On 21 June 2012, the HM Treasury and HMRC issued *Statutory definition of tax residence and reform to ordinary residence: a summary of responses* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190098/condoc_responses_srt_or_summary.pdf>, which included the Government's response to the issues raised in consultation, draft legislation and requested further consultation to refine some details. In December 2012 HM Treasury released *Statutory definition of tax residence and reform of ordinary residence: summary of responses to the June 2012 consultation* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190097/consult_responses_statutory_definitions_of_tax_residence_reform_of_ordinary_residence_responses.pdf> which sets out the Government's responses to the June 2012 consultation and provides an overview of changes made to the draft legislation.

47 Ibid, in the original HM Treasury and HMRC released *Statutory definition of tax residence: a consultation* (17 June 2011) at para 1.7.

48 HM Treasury and HMRC, *Statutory definition of tax residence and reform to ordinary residence: a summary of responses* (21 June 2012), supra n 46.

49 *R (on the application of Davies & Another) v R & C Commrs; R (on the Application of Gaines-Cooper) v R & C Commrs* [2011] BTC 610

50 Anna Florczak 'The new statutory definition of residence for individuals in the UK in the light of the tax treaty dual residence rules', Institute of Advanced Legal Studies, University of London, 50 <http://sas-space.sas.ac.uk/5887/1/Anna%20Florczak%20MA%20Dissertation.pdf>.

51 See HM Treasury and HM Revenue and Customs, Statutory definition of tax residence: a consultation (17 June 2011), supra n 46 at [3.6].

52 See s 218 and Schedule 45 of the Finance Act 2013 (UK), para 3. It states , An individual ("P") is resident in the UK for a tax year ("year X") if— (a) the automatic residence test is met for that year, or (b) the sufficient ties test is met for that year.

53 Ibid para 5.

'sufficient ties test'. [54] If neither test is met for a tax year that person (referred to as 'P' in the legislation) is non-resident for that year.[55]

The 'automatic residence test' is met if P meets at least one of the four 'automatic UK tests'[56] and none of the 'automatic overseas tests'.[57] The four automatic UK tests consist of a 183 day rule,[58] 'sufficient time' being spent in home in the United Kingdom,[59] the 'full time work in the UK' test, [60] and a specific test which applies to a year of death.[61]

There are also five exclusionary 'automatic overseas tests', which if satisfied deem a person to be non-resident for the tax year for which the test is applied.[62] Under these tests a person will be non-resident for a tax year if 'P':

- spends fewer than 16 days in the UK in that year, does not die during the year, and was resident for one or more of the three tax years immediately preceding that year (first automatic overseas test);[63] or

54 Ibid para 17.
55 Ibid para 4.
56 Ibid paras 6 to 10.
57 Ibid paras 11 to 16.
58 Ibid para 6.
59 Ibid para 8. The person's presence must be for at least one period of 91 consecutive days (at least 30 of which fall within the tax year) throughout which condition A or condition B (or a combination of those conditions) is met. Condition A is that P has no home overseas, while condition B deals with the situation where P has one or more homes overseas but does not spend more than a 'permitted amount of time' in any one of those homes in the tax year. A 'sufficient amount of time' in a UK home is presence there at any point on at least 30 separate days in the tax year (para 8(4)), while 'permitted amount of time' in an overseas home is presence there at any point on fewer than 30 days in the tax year (para 8(5). References to P being present in a home on at least, or fewer than, 30 days are to 30 separate days, whether consecutive or intermittent, and that for these purposes P presence at a home only if it is P's home at that time (para 8(6). Where P has more than one home in the UK, the test must be applied to each of those homes individually (para 8(8). See the Explanatory Materials for the Finance Act 2013 (c.29) for a more detailed explanation.
60 Ibid para 9. The test is met if P works 'sufficient hours' (as defined in para 9(2) in the UK over a period of 365 days without a 'significant break' from work (defined in para 29), and all or part of the 365-day period falls within the tax year. More than 75 per cent of P's working days in the 365-day period must be UK work days (para 9(1)(d)). A UK work day is a day in which P does more than 3 hours' work in the UK. There must be at least one day falling within both the 365-day period and the tax year that is a UK work day (para 9(e). 'Sufficient hours' is determined by a five step calculation in para 9(2), Under that calculation process P will have worked sufficient hours in the UK if P has worked on average 35 hours a week or more in the UK. The test will not apply if P has a relevant job on board a vehicle, aircraft or ship at any time in the tax year (as defined in par 30) and makes, as part of the job, at least six cross-border trips in the tax year that either begin or end in the UK (or both begin and end in the UK) (para 9 (3)).
61 Ibid para 10. .The broad effect of this test is that where P has been resident under one of the automatic UK residence tests in each of the previous three tax years and has a home in the UK, P stays resident in the year of death unless P went abroad in the previous year in circumstances such that split year treatment applied (provided none of the automatic overseas tests is met).' See the Explanatory Materials for the Finance Act 2013 (c.29) for a more detailed explanation.
62 Ibid para 11.
63 Ibid para 12. The Explanatory Notes for the Finance Act 2013 (c.29) notes at para 31 that 'this exclusion ensures that P does not automatically become non-resident if P dies early in the tax year.'

- spends fewer than 46 days in the UK in that year and was resident for none of the three tax years immediately preceding that year (second automatic overseas test); [64] or
- works 'sufficient hours overseas' for that year without a significant break from work,[65] has fewer than 31 UK work days (i.e., works for more than 3 hours in the UK) in that year and spends fewer than 91 days in the UK in that year [66] (the "full time work overseas" test) (third automatic overseas test); [67] or
- P is non-resident for a tax year if P dies during the year (subject to special conditions) (fourth automatic overseas test); [68] or
- if P dies during a tax year, having already been non-resident under the third automatic overseas test for the two preceding tax years (or for the year preceding the current tax year, with the year before that qualifying for Case 1 split year treatment) and if P meets the third automatic overseas test as modified (fifth automatic overseas test). [69]

As mentioned above, the second criteria under the basic test is the 'sufficient ties test'. P will be resident under that test if P meets none of the 'automatic UK tests' and the 'automatic overseas tests' and if P has sufficient 'UK ties' [70] for the tax year.[71]

The number of 'UK ties' sufficient to make P UK resident for a tax year depends on whether P was UK resident for any of the three tax years immediately preceding that year and the number of days P spends in the UK in the year. [72] The number of UK ties required is set out in paragraphs 18 and 19 of Schedule 45 of the Finance Act 2013 (UK). [73]

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64 Ibid para 13.
65 Ibid para 29.
66 Ibid para 22.
67 Ibid para 14. As with the sufficient hours test in para 9 of Schedule 45 (supra n 60) there by a five step calculation in para 14(3) for assessing whether or not P has worked sufficient hours overseas an average of more than 35 hours) in the tax year. and an exclusion from the third automatic overseas test if P has a relevant job on board a vehicle, aircraft or ship at any time in the year (as defined in para 30) (para 14(4). the special rule in para 23(4) (under which certain days on which P is present in the UK other than at midnight count as days spent in the UK) does not apply for the purposes of the third automatic overseas test (para 14 (2).
68 Ibid para 15. These conditions are that P spends fewer than 46 days in the UK in that year, and either P was non-resident for the two tax years immediately preceding the tax year in which P dies or was non-resident for the tax year immediately preceding that tax year and the tax year before that was a 'split year' by virtue of Case 1, 2 or 3 of Part 3 of this Schedule (see paras 44 to 46). The Explanatory Notes for the Finance Act 2013 (c.29) notes at para 37 that the effect of this provision is 'to ensure that an individual who dies without establishing three full years of non-residence may in certain circumstances benefit from a 46-day rule equivalent to that in para 13.'
69 Ibid para 16. The fifth automatic overseas test which ensures that P's non-resident status is preserved in certain circumstances where P dies while working overseas. The modifications to be applied to the third automatic overseas test in this situation are set out in para 16(3).
70 Ibid para 17.
71 Ibid Part 2 of this Schedule,
72 Ibid para 17(3),
73 Ibid para 17(3), Paragraph 18 sets out how the number of days P spends in the UK in a tax year determines the number of UK ties sufficient to make P resident for that year if P was UK resident in one or more of the three tax years immediately preceding the year. Paragraph 19 sets out how the number

In summary, the resultant legislation to give effect to the basic test, the automatic residence test, 'automatic UK tests', 'automatic overseas tests' and 'sufficient tie test' and embedded definitions consists 159 sections of complex legislation. There are numerous detailed definitions (covering element such as what constitutes a 'day spent', a 'home', 'work', 'location of work', etc., and there are extensive specific anti-avoidance rules (many focused on countering actions to avoid the scope of the defined terms). This is not ideal out come as the complexity of subjectiveness has been replaced with legislative complexity. However, one commentator has concluded that although the new rules bring:

> … a greater certainty when dealing with the complex situations of internationally mobile individuals than the old rules ... there are certain areas which are still subjective and' they are … undesired complexity as the legislation is a maze of the tests combined with their subsidiary tests and the definitions which are either confusing or illogical at times.[74]

Thus, the very attempt to convert a complex policy into a certain outcome comes at a cost of complexity and a loss of equity which is not ideal.

3,3 Lessons for Australia and Canada?

Whether such a model is suitable for transplantation into Australia or Canada can only be determined in terms of the policy parameters operation in each jurisdiction.

From the Australian perspective the policies that underlie the United Kingdom rules do not reflect Australia's current policy.[75] The major difference is the United Kingdom policy of ensuring that once residency is obtained it is very difficult to lose that residence.[76]

Another major policy difference with adopting the unique United Kingdom rules is the United Kingdom system is designed to work hand in hand with a 'non-domiciled' residents regime whereby United Kingdom residents who have their permanent home ('domicile') outside the United Kingdom may not have to pay United Kingdom tax on foreign income if it is not remitted to the United Kingdom and is less than £2,000 in a year. If the income is £2,000 or more or any money is brought back to the United Kingdom that income is either subject to United Kingdom tax or the 'remittance basis' of taxation applies. An exit tax can also be imposed. As Australia does not adopt this system the scope of the United Kingdom rules may need modification if adopted in Australia.

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of days P spends in the UK in a tax year determines the number of UK ties sufficient to make P resident for that year if P was UK resident in none of the three tax years immediately preceding the year. Modifications where P dies during the year are set out in para 20.

74 Anna Florczak, supra n 50.

75 That policy is expressed in the *Explanatory Notes, Bill to Amend the Income Tax Assessment Act 1922-1929 (Cth)*.

76 HM Treasury and HM Revenue and Customs, Statutory definition of tax residence: a consultation (17 June 2011), supra n 46 at [3.6].

In the Board's 2017 Report the Board observed that the United Kingdom's statutory residency test:

> would improve certainty for individuals applying the residency rules. However, the Board does not consider that the increased complexity and divergence from 'principles based drafting' is justified.[77]

Despite that the Board recommended:

> Subject to the policy statement, the Board recommends that each residency test begin with a bright line test to remove the facts and circumstances based tests for the majority of individuals. The Board recommends that further consultation on these bright line tests be based on the New Zealand and United Kingdom residency rules.[78]

The author is unable to determine whether similar concerns about complexity and divergence from 'principles based drafting' exist in Canada.

4. The proposed Australian changes

4.1 Background

Despite the facts and circumstances nature of Australia's individual residence rules only 25 High Court, Full Federal Court of Australia, Federal Court of Australia, and Administrative Appeal Tribunal (AAT) matters dealing with the residency of individuals in the 79 years between 1930 and 2009. This low level of litigation was probably due to the fact that much of the foreign income earned by residents was exempt in Australia[79] until 1987 and the existence from 1987 of a wide exemption for foreign employment income derived by Australian resident individuals.[80]

However, with narrowing from 1 July 2009 of an exemption[81] for foreign employment income derived by an Australian resident individual[82] and increased compliance activity in respect of offshore income carried out by an ongoing cross agency taskforce led by

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77 The Board's 2017 Repor supra n 39, Observation 1, 10. They noted at para 1.172: 'that codification akin to the UK approach would not align with the Government's simplification agenda and the Board's preferred principles based drafting approach. The overly complex drafting of the law and increased length of legislation is in direct conflict with simplification. Further, as codification is solely a process of importing into strict legislative provisions the current common law and guidance on the residency tests, it would not allow for the modernisation of the rules that the Board considers necessary.'

78 Ibid Recommendation 5.

79 Under the former s 23(q) of the ITAA 1936 income which was subjected to tax in country of source was exempt. By late 1985, this prevailing exemption of foreign source income encouraged investment in low tax jurisdictions resulting in much foreign source income being either not taxed or taxed lightly - see Allen Boxer, 'Tax Reform Revisited' (1985) 2 *Australian Tax Forum* 363, 373 and Richard Fayle, 'Controlling Abusive Tax Shelters' (1985) 2 *Australian Tax Forum* 53, 64.

80 In 1987 s 23(q) of the ITAA 1936 was repealed with the introduction of the then foreign tax credit rules by the Taxation Laws Amendment (Foreign Tax Credits) Act 1986 (Cth) and a wide employment income exemption enacted (s 23AG of the ITAA 1936).

81 In s 23AG of the ITAA 1936.

82 Tax Laws Amendment (2009 Budget Measures No 1) Act 2009 (Cth).

Australian Taxation Office (ATO)[83] this changed. Between 2010 and 2018, there have been 38 matters heard by the Full Federal Court of Australia, the Federal Court of Australia, and the AAT in respect on the residency of individuals and associated issues. The issues covered in the litigation included;

- application of the 'resides' and 'domicile tests'; [84]
- determination of 'permanent place of abode'; [85]
- application of the 'half year' test;[86]
- application of 'superannuation' test;[87]
- treaty tie-breaker test in Article 4(2); [88] and
- related matters associated with the onus of proof and the provision of evidence in the context of residence disputes and application of the former s 23AG of the ITAA 1936 (the foreign employment income exemption).[89]

Given this sheer volume of litigation the Commissioner was provided with the ammunition to argue that the current system is unsustainable as it is too complex in terms of applicability and the resultant tax avoidance is costly to government. However,

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83 The taskforce (Project Wickenby) was established in 2006. It membership includes the ATO, the Australian Crime Commission (ACC), the Australian Federal Police, the Australian Securities and Investments Commission, the Attorney-General's Department, the Commonwealth Director of Public Prosecutions, and the Australian Transaction Reports and Analysis Centre.

84 *Mynott and Commissioner of Taxation* [2011] AATA 539, *Iyengar and Commissioner of Taxation* [2011] AATA 856, *Gunawan and Commissioner of Taxation* [2012] AATA 119, *Sneddon and Commissioner of Taxation* [2012] AATA 516, *Sully and Commissioner of Taxation* [2012] AATA 582, *Re Bezuidenhout and Commissioner of Taxation* [2012] AATA 799, *Ellwood and Commissioner of Taxation* [2012] AATA 869, *Re Pillay and Commissioner of Taxation* [2013] AATA 447, *ZKBN and Commissioner of Taxation* [2013] AATA 604, *Murray and Commissioner of Taxation* [2013] AATA 780, *Re Dempsey and Commissioner of Taxation* [2014] AATA 335, *Agius and Commissioner of Taxation* [2014] AATA 854 (appeal on source issue dismissed in *Agius v Commissioner of Tax*ation [2015] FCA 707, but further appeal lodged 7.8.15), *The Engineering Manager and Commissioner of Taxation* [2014] AATA 969, *Hughes and Commissioner of Taxation* [2015] AATA 1007, *Landy and Commissioner of Taxation* [2016] AATA 754.

85 *Re Boer and Commissioner of Taxation* [2012] AATA 574, *Mayhew and Commissioner of Taxation* [2013] AATA 130 and *Harding v Commissioner of Taxation* [2018] FCA 837

86 *Re Clemens and Commissioner of Taxation* [2015] AATA 124, *Re Jaczenko and Commissioner of Taxation* [2015] AATA 125, *Re Koustrup and Commissioner of Taxation* [2015] AATA 126, *Groves and Commissioner of Taxation* [2011] AATA 609, and *Guissouma and Commissioner of Taxation* [2013] AATA 875.

87 *Baker and Commissioner of Taxation* [2012] AATA 168.

88 *Re Tan and Commissioner of Taxation* [2016] AATA 1062.

89 *Shord v Commissioner of Taxation* [2017] FCAFC 16 (AAT error re s 23G – appeal from *Shord v Commissioner of Taxation* [2016] FCA 761 (s 23AG(7) & onus) (being an appeal from *Re Shord and Commissioner of Taxation* [2015] AATA 355 (resident test)), *Boyd and FCT* [2013] AATA 494 (s 23AG), *Coventry v Commissioner of Taxation* [2018] AATA 175 (s 23AG(1AA)(a) exempted a public servant's employment income from an aid project despite it being exempt from tax in Pakistan under a development agreement between that country & Australia), *Lochtenberg v Commissioner of Taxation* [2018] AATA 4667 (s 23AG & Swiss component of Glencore incentive profit participation plan),*Horrocks v Commissioner of Taxation* [2010] AATA 307 and *Mulherin v FCT* [2013] FCAFC 115 (dismissed appeal from *Murray and Commissioner of Taxation (No 3)* [2012] AATA 557) (on onus of proof) and *Commissioner of Taxation* v *Seymour* [2015] FCA 320 (reversing order allowing video evidence in *The Overseas Applicants and Commissioner of Taxation* [2014] AATA 788) and *Seymour and Commissioner of Taxation* [2016] AATA 397 where AAT the giving of evidence in AAT proceedings in Singapore, on the condition that the taxpayers cover the AAT's expenses of conducting that part of the hearing outside Australia.

the volume of litigation was not due to uncertainty or complexity. Most of the recent litigation was:

- consistent with existing jurisprudence;[90]
- not driven by the difficulties of interpretation and application;[91] but
- driven by the 2009 decision by the Government to remove for most taxpayers their entitlement to the foreign employment income exemption.

The number of cases litigated post 2009 was also inflated by:

- the Australian Taxation Office's (ATO's) adoption of a mechanical 'continuity of association with the place' test, which resulted in some cases being argued that should not have been litigated;[92]
- the establishment compliance programs targeting offshore income, such as 'Project Wickenby'; and
- a failure to ensure compliance with the foreign employment income exemption in s 23AG of the ITAA 1936 from 1987 to 2009, which resulted in s 23AG issues being litigated over 20 years later than they should have been.[93]

Despite these arguments in 2016 the Board of Taxation began a self-initiated project looking at the 'Residency tests for High Wealth Individuals', [94] which included the question - whether Australia's tax residency rules for individuals are sufficient to deal with certainty, simplicity and integrity within 21st Century residency fact patterns. The 2013 UK model was something they considered as a model for reform.

4,2 Outcome of the Board of Taxation's self-initiated review

On 9 July 2018 the then Minister for Revenue and Financial Services released the Board's 2017 Report.[95] The Board concluded, following a targeted, confidential, and 'extensive' consultation 'that the existing residency rules are no longer appropriate as the fundamental basis of individual income taxation' and recommended that the rules must be modernised and reformed (Recommendation 1).[96] The Board's case for change was that the residency rules:

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90 For a comprehensive review of the futility of this litigation see Michael Dirkis, '"The ghosts of *Levene* and *Lysaght* still haunting ninety years on: Australia's 'great age' of residence litigation?" (2018) 47(1) *Australian Tax Review* 41-53.

91 Ibid.

92 Ibid and Michael Dirkis, 'Chapter 4: The residency rules', in Phil Broderick et al, *The Australian Taxation System: The 2017 Great Debate*, Australian Tax Research Foundation (2018), 57-75.

93 Michael Dirkis, and Angie Ananda, 'Taxing beyond Australia's horizon: the section 23AG changes' (2009) 44 *Taxation in Australia* 153.

94 Board of Taxation, *CEO Update – July 2017* <http://tax>board.gov.au/publications-and-media/ceo-updates / >

95 The Board's 2017 Report, supra n 39,

96 Ibid para 1.2. The Board concluded in para 1,4 that the modernised residency rules should:
- reflect current global work practices;
- provide certainty to individuals of their tax residency status;
- can be applied by an ordinary individual without tax advice in all but the most complex of cases;

- no longer reflect global work practices in an increasingly global mobile labour force, that have changed both the frequency and nature of interactions with the residency rules;
- impose an inappropriate compliance burden on many taxpayers with relatively simple affairs as the rules are inherently uncertain to apply, include outdated concepts and rely on a 'weighting' system that leads to inconsistent outcomes, which also gives rise to integrity risks; and
- are an increasingly prevalent area of dispute for taxpayers and the ATO given the fundamental difference in tax consequences for residents and non-residents — this is illustrated by the increased number of court decisions and ATO private rulings issued since 2009 (and the amendments to narrow section 23AG of the *Income Tax Assessment Act 1936*). [97]

The Board set out in a further seven recommendations its preferred framework for a new residence definition. [98] The key elements were:

- there should be a policy statement, such as an objects clause, that outlines the Government's overarching individual tax residency policy addressing the tax policy objectives of equity, efficiency, simplicity and integrity (Recommendations 2 and 3);
- in accordance with the policy statement, the new resident definition should include separate definitions for individuals establishing residency and ceasing residency (Recommendation 4):
- each definition should commence with a simple bright line 'days count' test that ensures the vast majority of individuals can determine their residency quickly and with certainty Recommendation 5); and
- for individuals that do not satisfy either bright line test, an objective test based on the individual's facts and circumstances should then apply to determine residency on the basis of specific key factors (to determine the individual's connection or relationship to Australia) (Recommendation 6);
- a rule should be adopted to the effect that Australian residency is maintained until tax residency is provably established in another jurisdiction, to address integrity concerns identified during consultation (Recommendation 7);
- the current rule that seeks to deem Government officials and their families resident no longer captures many Government officials and, as such, any new definition should include a more effective rule that reflects the

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- remove antiquated concepts such as domicile; and
- adopt factors that are easy to understand, reduce reliance on common law definitions, and are less open to manipulation.

97 Ibid para 1.2

98 There were a further 3 recommendations concerning labour mobility and the indirect consequences of the employee exemption (Recommendation 9), limiting the temporary residents concession to four years (recommendation 10), and consideration of alignment of the individual tax residency rules and Australia's immigration visa regime - Ibid at 11 and 12

Government's position regarding public servants (such as a specific government services rule) (Recommendation 8). [99]

4,3 A further consultation

Following the release of the Board's 2017 Report in August 2017 the then Minister for Revenue and Financial Services[100] noted there were complex issues raised in the Report that 'deserve further analysis and consideration'. Thus, the Government did not take a position on the recommendations in the Board's report. The Minister noted that 'before the Government takes any position on these matters I have asked the Board to consult further on key recommendations, including how Australia could draw on residency tests in other countries.' Once the Board has completed its additional work the Minister indicated that the Government will consider the entirety of the Board's work on this topic and in light of broader reform priorities.

In September 2018, the Board released a Consultation Guide (*Review of the income tax residency rules for individuals: Consultation guide* (2018 Consultation Guide)),[101] which sets out the Board's observations on potential design principles to guide the modernisation and reform of the individual tax residency rules, It poses 33 questions about how these design principles would operate to provide simplicity, certainty and integrity and whether these considerations are appropriately balanced. It focused on:

- the options for a two-step model for individual tax residency;
- the integrity risk posed by 'residents of nowhere' and related schemes to circumvent the tax residency rules; and
- updating the superannuation test.

The 33 questions posed in the 2018 Consultation Guide were divided up into the following seven categories:

- policy statement (two questions);
- bright line test (seven questions);
- secondary test (12 questions);
- integrity: resident nowhere (four questions);
- the superannuation test: options for reform (three questions);
- part-year residency (three Questions); and
- transitional rules (one question).

99 Ibid para 1.5 and at 10 and 11

100 Minister for Revenue and Financial Services In 'Review of Tax Residency Rules for Individuals' (9 July 2018 Media Release: http://kmo.ministers.treasury.gov.au/media-release/083-2018/)

101 Board of Taxation, *Review of the income tax residency rules for individuals: Consultation guide* (September 2018) < http://taxboard.gov.au/consultation/reforming-the-income-tax-residency-rules-for-individuals/>

This paper does not seek to respond to every question raised but will focus on the major areas of perceived difficulty.[102] There are two overarching concerns with the Board's approach. They are:

- that the proposed changes appear to frustrate Board's the goals of certainty and simplicity recommending an integrity regime that seeks to deal with rare occurrences that arise not necessarily due to residence abuse but often due to the operation of other provisions of the Income Tax Assessment Acts; [103] and
- despites assertion in the 2018 Consultation Guide that the revenue impact of the measure will be 'immaterial or negligible'[104] the reform proposals mooted in the Consultation Guide will expand the scope of persons caught by the rules and thereby Government revenue. The proposals which include the development of a more adhesive residence rule, the creation of two clear bright-line tests (which may include the measurement of presence over any 12-month period) and a factor test coupled with revision of the superannuation test will also increase the current scope of the individual tax residence rules.

From a tax policy perspective, there are a number of issues with the bright-line test proposed by the Board (i.e., the primary test based on time spent (i.e., a 'day count') to automatically determine the residency status of the majority of individuals).[105] These arise from the departure from Recommendation 4 of the Board's 2017 Report, (i.e., that a single outbound test should be developed).[106] The Board has now proposed three different bright-line outbound tests for individuals (a lower bright line threshold for those who have previously been resident, a different threshold test for those who were not and a special for individuals who are working full time overseas to be non-residents in certain circumstances.[107] This departure seems to complicate rather than simplify matters. The previous resident test seems sufficient to establish an outbound bright line test, that is, if any individual spends less than x days in Australia over any 12-month period (i.e., not tied to a financial year) they are a non-resident. This test could also be applied to take into account presence in prior years, thereby minimising avoidance by persons leaving the country before the specified time period is satisfied and returning once the period restarts.

The need for the 'previously not a resident' test seems unnecessary and from a policy viewpoint seems to undermine the inbound bright-line test. It seems to provide that if

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102 The language and content of the follow will have similarity with that in the Taxation Institute's 20 November 2018 submission to the Board as it was drafted by the Author

103 For example, (subject to the new anti-hybrid rules), a taxpayer who becomes a United States resident will get the fully franked dividends tax free under both the United States and Australian rules even where the profits giving rise to those dividends accrued in a Proprietary Limited Company whilst the taxpayer was an Australian resident shareholder. The tax-free nature arises from the franking/withholding rules, not the residence status of the taxpayer.

104 2018 Consultation Guide, supra n 101 at 26.

105 Ibid, at 6, 10 to 13.

106 The Board's 2017 Report, supra n 39 at 10,

107 2018 Consultation Guide, supra n 101 at 10-11

a person enters Australia for the first time and exceeds 183 days, then under this test the residence determination is reversed and treats them as a non-resident if they are here for more days than a person who was formerly a resident. This is because they are resident for the first time. This different treatment cannot be justified on the adhesive principle. In fact, it undermines that principle by saying it is only adhesive if you are a serial resident. For consistency and certainty, the Factor test should be the instrument used to exclude them.

The third outbound test seems to reinstitute the former scope of amended employment exemption (s 23AG of the ITAA1936) and extend its scope further by treating persons working full-time in non-taxing jurisdictions as non-residents. The only difference between this and other departing Australians is a continuing employment relationship with an Australian employer and that the employment must be full-time.

This 'employment element leads to definitional issues on what amounts to full time work and whether the employment must be with the Australian employer or with an affiliated entity. For example, if fulltime work is defined in terms of hours, then this this can be problematic as some European countries' labour laws mean that full time can range from 28 hours to 38 hours. In these countries if you work longer weeks you get longer holidays. In the 'gig' environment fulltime work as traditionally defined may not exist, with a person renumerated per task or on a piecemeal basis. Verification can be difficult for people who are employed by companies they control. If someone is posted overseas for two or three years, then they will either fall outside the bright-line outbound test or succeed under the factor test. Therefore, this test will increase complexity and is inconsistent with the guiding principles expressed in the 2018 Consultation Guide[108] and Recommendation 4.

Finally, Recommendation 7 of the Board's 2017 Report, which recommended the adoption of a new residency test for outbound individuals to ensure that all residents remain resident until tax residency is established in another jurisdiction' [109] was not picked up in the proposed out-bound tests. Given that it is easy to acquire 'tax residence' in a number of countries around the world (e.g., Portugal) whilst in other countries it may be difficult to establish tax residence where the country does not have an income tax system (e.g. Lebanon), such a rule would result in inequitable outcomes in some cases and encourage avoidance in other cases. As such, recommendation 7 should not be adopted. .

There also remains issues with the proposed secondary test which seems to be based on the United Kingdom's 'UK ties' approach, Although the relevant factors to be used under the secondary test should all be easily verifiable, they also need to be highly relevant in determining residence under the secondary test. Some factors, that currently get taken into account under the existing residency tests, and suggested in 2018 Consultation Guide,[110] are of little relevance (e.g., immigration passenger cards,

108 2018 Consultation Guide, supra n 101 at 7
109 The Board's 2017 Report, supra n 39 at 10,
110 Questions 11 to 17 in the 2018 Consultation Guide, supra n 101 at 14,

membership of clubs, driver's licences, holding of bank accounts, and health insurance), or able to be manipulated, or do not take into account the practical circumstances of modern life (e.g. the inclusion of family members as a linking factor regardless of dependence, age and estrangement).

The other issue with the proposal is the weighting of the factors. Any weighting system would no doubt add some complexity. However, there may be merit in exploring a weighting system as a secondary factor-based test as the Consultation Guide suggests, provided it is based on a short list of objective factors and it is clear what 'weighting' is allocated to each one.

14.4 Summary and lessons for Canada?

In summary, as well as the issues discussed above in respect of the basic outbound tests and the factor proposals in the secondary test, there remains a number of other issues with the Boards proposals. Until these issues are resolved the final approach to be adopted by Australia remains unclear. Given an election in May 2019 and a favoured opposition party with numerous tax reform priorities, it is unlikely that much clarity will emerge in the near future.

Therefore, at this stage, other than highlighting a range of possible solutions to the short-comings identified in Canada's facts and circumstances approach to individual's residency, the Australian reform excise is yet to provide a viable template for reform.

5, Conclusion

The paper has highlight similar defects in the fact and circumstances approach adopted by Canada and Australia in respect of rules for determining individual tax residence. Although the United Kingdom's 2013 adoption of a 'statutory residence test for individuals removes the complexity arising from the subjectivity of the facts and circumstances approach it comes at cost, complexity. In light of Australia's rejection of this approach its value to Canada as a model for reform may also be viewed as limited. Similarly the incomplete Australian reform proposal highlight the difficult in moving away from a facts and circumstance model, particularly, where compliance objectives override the perceived objectives of simplicity and certainty. At best they offer alternative avenues for Canada to consider, should the political climate make repairing the existing shortcomings a priority.