

## TAX SNAPSHOT

Revised Individual Tax Residence Tests – Treasury Consultation - July 2023

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**Over 2 years after Individual Tax Residence legislative changes were announced in the former Government’s 2021/22 Federal Budget, Treasury has released Consultation ahead of implementing a new and simplified approach to Australian Individual Tax Residence in future income years. We summarise the previously proposed changes and key new consultation questions below.**

On 21 July 2023, Treasury released a Consultation Paper entitled ‘[Modernising the individual tax residency rules](#)’ (**Consultation Paper**) to commence consultation regarding the proposed introduction of a simplified ‘*bright line*’ approach to determining an individual’s residence likely to take effect for income years commencing after Royal Assent to future final legislation.

The outcomes of these changes will have broad implications, including but not limited to:

- Whether or not individual taxpayers are:
  - taxed on their worldwide or only their Australian-sourced income;
  - subject to Australian CGT on all assets or only on direct or indirect Taxable Australian real Property (**TARP**), and/or
  - able to access numerous tax concessions including resident individual tax rates, CGT discount and main residence exemption etc.
- How much tax businesses/employers need to withhold from their workers based on their tax residence status; and
- In limited cases, potential implications for an entity’s Australian tax residence (e.g. a trust’s residence can be affected by the residence status of its individual trustee(s), offshore incorporated companies may be affected by stakeholders’ residence status if the s 6 *ITAA* 1936 voting power test for corporate tax residence is relevant).

### NOTE

**Importantly, the new rules will not commence to apply until the year following Royal Assent to any final legislation. For current purposes, the ATO’s approach in its recently released [TR 2023/1 ‘Residency Tests for Individuals’](#) will remain relevant when determining individual Tax Residence. While [TR 2023/1](#) is undoubtedly an improved approach which contains various administrative ‘rules of thumb’ and updated guidance which may improve certainty regarding various individual tax residence scenarios, it remains constrained by the common need to refer to case law based on the specific circumstances involved under Australia’s current legislative provisions regarding tax residence.**

# TAX SNAPSHOT

## Revised Individual Tax Residence Tests – Treasury Consultation - July 2023

### NOTE

The proposed changes to the Individual Tax Residence are broadly based upon the Board of Taxation’s (BOT) 2019 Individual Tax Residency Report (subject to various potential adjustments following Consultation questions and feedback -see page 6 below). At release time, however, there is no indication whether or not there will be a similar consultation process and legislative change regarding the BOT’s Corporate Tax Residency Review - the recommendations of which were adopted by the former Federal Government in 2020 but have not been legislated to date.

### Overview - The proposed new Individual Tax Residence Rules and Current Consultation issues

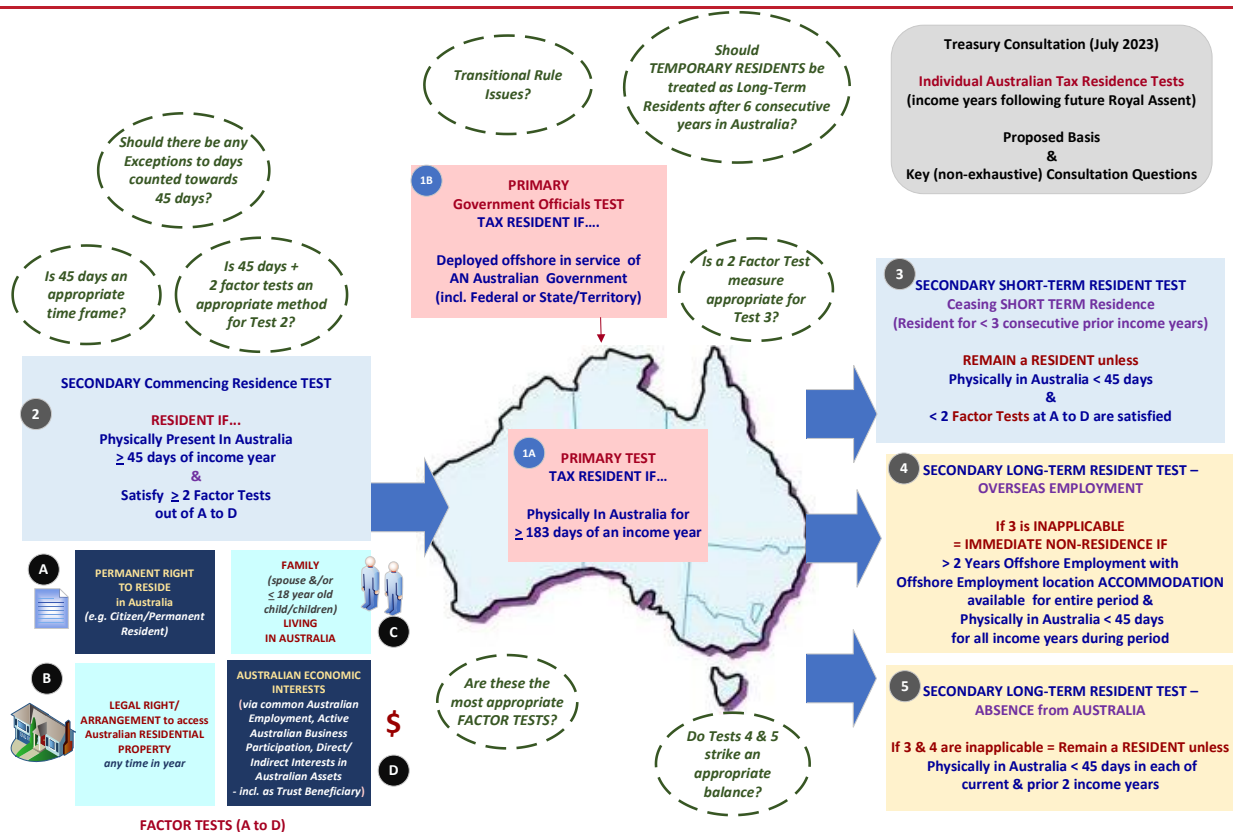
The diagram and online recording below provide a summary of the initial BOT framework underlying proposed new Individual Australian Tax Residence Rules and key consultation questions raised which may impact the final legislation details. See also further comments from page 3 below.

To watch Tax Astute Training’s online explanation of the below diagram, please use this link:

<http://taxastute.adobeconnect.com/pcziybakz2dw/>

This link connects with the Adobe Connect website.

*(Adobe are a trusted software developer and are the makers of PDF).*



## TAX SNAPSHOT

### Revised Individual Tax Residence Tests – Treasury Consultation - July 2023

---

As illustrated in the above diagram and online recording, subject to any potential transitional treatment and other adjustments following Consultation (see also page 6 below), for income years commencing after future Royal Asset the proposed new Australian Tax Residence rules will broadly involve:

- A simple '*bright line*' **Primary Test** whereby any individual who is physically present in Australia for  $\geq 183$  days of any given income year will automatically be an Australian Tax Resident in that income year (see **item 1A** above).

It is also noted that there is more specific simple Primary Government Officials Test at **item 1B** above which automatically treats any individual deployed offshore in the service of an Australian Government (including Federal, State or Territory). This represents an expanded and modernised replacement for the existing Commonwealth Super Fund Test. Examples of individuals subject to this test could include Federal consular personnel, Federal armed forces personnel stationed overseas through to offshore-based State/Territory Government trade envoys and similar roles.

- Where an individual is not subject to either of the above Primary Tests in an income year (usually due to  $< 183$  days physical presence in Australia during that income year) then **Secondary Tests may apply** as follows:
  - The individual may **START** to be an Australian Tax Resident under the '**Secondary Commencing Residence Test**' (see **item 2** above) where:
    - they were not previously a Tax Resident; and
    - they are physically present in Australia for  $\geq 45$  days; and
    - $\geq 2$  of the Factor Tests (at **items A to D**) are satisfied (see also page 5 for further Factor Test details).
  - Alternatively, where the individual is physically present for  $< 183$  days of the tested income year but was a Tax Resident within the last 3 prior income years then they **MAY CEASE** to be an Australian Tax Resident via 1 of 3 **Secondary Ceasing Residence Tests** where:
    - If the individual is a **Short-Term Resident** (e.g. due to being a Tax Resident for  $< 3$  consecutive prior income years – see **item 3** above) then under the Secondary Short Term Residence Test they will remain an Australian Tax Resident **unless** they both:
      - were physically present in Australia for  $< 45$  days of the income year; and
      - satisfied  $< 2$  of the factor tests shown at items **A to D** above (effectively where one or zero Factor Tests apply – see also page 5 for more Factor Test details).

## TAX SNAPSHOT

### Revised Individual Tax Residence Tests – Treasury Consultation - July 2023

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- If, instead, the individual potentially ceasing Australian tax residence is a **Long-Term Resident** (e.g. due to being a Tax Resident for  $\geq 3$  consecutive prior income years) then either:
  - the individual may **immediately become a non-resident** for Australian tax purposes under the **Secondary Overseas Employment Test** (at **item 4** above) if they have a > 2 year offshore employment period involving both the following factors being present throughout that offshore employment period (see **item 4** above):
    - accommodation being available at the offshore employment location throughout the period; and
    - < 45 days physical present in Australia throughout each income year during that period; or
  - The individual will otherwise **remain an Australian Tax Resident** in the tested year unless they are physically in Australia for < 45 days of each of the current and the prior 2 income years (i.e. total 3 consecutive years of substantial absence from Australia before Australian tax residence can be lost/non-residence achieved).

Subject to any future consultation adjustments, under any other scenario which was not covered by the above tests, the individual would be a non-resident for Australian tax purposes under the new rules.

## TAX SNAPSHOT

### Revised Individual Tax Residence Tests – Treasury Consultation - July 2023

---

#### The proposed Residence Factor Tests

The four proposed Residence Factor Tests (see **A to D** of the diagram at page 2 above) are currently proposed to be essential features of each of:

- the Secondary Commencing Residence Test (see **item 2** above); or
- the Secondary Short-Term Resident Ceasing Residence Test (see **item 3** above).

A summary of the current list of factor tests **A to D** above (where either  $\geq$  or  $<$  2 tests must be present under the secondary tests at items 2 or 3 respectively) is as follows:

- A **Permanent Right to Reside in Australia** (e.g. via Australian Citizenship or Permanent Residence) – **see A** above;
- A legal right/arrangement to access **Australian Residential Property** at any time during the relevant income year (noting that ownership is not necessarily a requirement, lesser interests such as licences to use the property could suffice but exceptions for third party rental use may apply) – **see B** above;
- **Family** (described as the tested individual's spouse and/or  $\leq$  18 year old child/children) living in Australia – **see C** above; or
- **Australian Economic Interests** (e.g. common employment or participation in an active business in Australia or ownership or direct or indirect interests in Australian assets – including as a Trust Beneficiary) – **see D** above.

For example an individual arriving in Australia close to financial year year-end on a short-term visa with their immediate family and a signed lease on a rental property could be a tax resident of Australia in that income year under the proposed Secondary Commencing Residence Test (despite a  $<$  183 day physical presence in Australia).

#### NOTE

**The factor tests are one of the issues potentially subject to some change due to the questions raised in the Consultation Paper – see further details in the page 2 diagram and also below.**

## TAX SNAPSHOT

### Revised Individual Tax Residence Tests – Treasury Consultation - July 2023

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#### Key Consultation Questions

As noted in the diagram at page 2 and below, the Consultation Paper explains that the above summary framework for the new individual Residence Tests is likely to be subject to some adjustment based on consultation feedback received, particularly as the Board of Taxation Review (on which the current initial framework is based) was finalised in 2019, prior to the pandemic commencing.

While a full analysis of every single consultation question is beyond the scope of this Tax Astute Training Snapshot, the majority of key questions raised have been included on the page 2 diagram and recording with further details as follows:

- There are various consultation questions relating to **items 2 and 3** of the page 2 diagram (e.g. the **Secondary Commencing Residence** and **Short-Term Resident Ceasing Residence Tests** at 2 and 3 above) such as:
  - whether 45 days is the appropriate physical presence requirement;
  - whether 2 factor tests (or some other number of factor tests) is appropriate; and
  - whether the four factor tests currently proposed are the most appropriate tests to be used, or should they be added to or otherwise adjusted.
- There are also various questions regarding whether the three alternative **Ceasing Residence Secondary Tests** (see **items 3 to 5 inclusive** of the page 2 diagram) strike an appropriate balance between factors such as simplicity, certainty, managing compliance concerns and practicality in their currently proposed form.
- In addition, one consultation question relates to whether individuals who are **Temporary Residents** (i.e. the current hybrid tax treatment for specified temporary Visa holders under existing Subdiv 768-R ITAA 1997 which broadly applies a mix of resident and non-resident taxation treatments to different income types) should be effectively treated as long-term residents (who must satisfy one of **items 4 or 5** in order to revert to non-resident status) once they have been a **Temporary Resident for  $\geq 6$  years** (instead of the usual  $\geq 3$  year rule for other long-term residence scenarios proposed to be subject to the Secondary Tests at **items 4 and 5** above).

Importantly, the likely need for **transitional provisions** (e.g. to assist individuals who have planned for a specific Australian tax residence status which could substantially change under the new rules) has been raised as one of the final consultation questions listed in the Consultation Paper.

## TAX SNAPSHOT

Revised Individual Tax Residence Tests – Treasury Consultation - July 2023

---

### NOTE

There are no specific consultation queries regarding either of the Primary Tests shown at 1A and 1B of the page 2 diagram (e.g. the  $\geq 183$  days physical presence = tax residence rule). While this suggests that Treasury's position on these tests may be more settled, it is recognised that the entirety of the BOT's original 2019 Report initial framework explained above is open for Consultation at release time.

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