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INTERNATIONAL TAX FACTSHEET: AUSTRALIAN RESIDENT FOR TAX PURPOSES BECAUSE OF COVID-19?

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INTERNATIONAL TAX FACTSHEET

THE AUSTRALIAN TAX OFFICE HAS LONG SIGNALLED ITS APPETITE FOR DATA MATCHING AS A MEANS TO DETERMINE RESIDENCY, BUT WILL COVID-19 RESTRICTIONS CHALLENGE HOW IT APPLIES ITS RESIDENCY TESTS?

Australia's individual tax residency rules have proven to be extraordinarily difficult to apply in practice, resulting in high compliance costs for both individuals and employers. The evidence is in the frequent case disputes before the Australian Appeals Tribunal and the Federal Court of Australia.

The Australian Board of Taxation commenced a review of residency tax rules in 2016, the outcome of which highlighted just how complex Australia's laws are and that they have not kept pace with the changes

in how individuals work, travel, and live in a global and highly mobile workforce. Its recommendations to modernise and simplify residency tax legislation focused on reducing the overly complex application of four residency tests by replacing them with objective primary and secondary tests that remove the potential for reasonably arguable positions that are open to taxpayers.

The proposed changes are intended to create more certainty for tax outcomes by adopting objective criteria rather than establishing intent, as well as maintain existing outcomes where appropriate to minimise disruption to tax payers and revenue expectations for the government.

However, the unexpected challenge of the COVID-19 pandemic may still create significant issues before

the new rules were enacted as law, given that foreign and Australian nationals have been caught by border closures and travel restrictions.

THE CASE FOR SIMPLIFYING AUSTRALIA'S RESIDENCY RULES

The arguments for simplifying the residency rules were made clear in the Board of Taxation's review, for example:

- The nature of global workforces has changed substantially since tax residency rules were introduced 80 years ago.
- The ways that people work, travel and live alongside the cross-border nature of multinational companies has created considerable change in the global income taxation system
- The concept of 'domicile' and attachment to a single

country is outdated given the movement of people for work and travel

- The complexity of the rules provide leeway for individuals to argue for alternative determinations of tax outcomes or manipulate their residency status because of known integrity issues
- Lack of clarity around individual residency and intended or unintended consequences in a given situation can create uncertainty in how rules may be applied
- The cost of seeking advice and the inability of advisors to provide definitive advice results in high compliance costs

The review argued for a simpler ‘two-step’ model of a ‘brightline test’ as the primary test and a more detailed analysis of a tax payer’s situation as a secondary test.

The Board of Taxation was also tasked with exploring options for the two-step model as well as identifying integrity risks and a replacement for the current superannuation test for Government employees.

The Government announced in the 2021-22 Federal Budget that it would adopt new measures to determine individual residency.

HOW AUSTRALIA INTENDS TO SIMPLIFY AND MODERNISE ITS RESIDENCY TESTS

The Australian residency tests are inherently complicated and as case law shows, frequently subject to appeal when a determination is made regarding individual tax payers.

The Board of Taxation has recognised that changes are required to update the 80 year old Australian residency tax legislation and following its review, the Australian government has signalled it will adopt its proposed changes.

Four residency tests will be replaced by primary and secondary tests as outlined in the table below:

Residency test	Current Application	Proposed changes
The resides test	The broader review of a taxpayer’s circumstances to determine intent, purpose, family connections, asset locations, typical living situation, and other relevant factors	Replace with a primary ‘brightline’ test of spending more 183 days or more in Australia, after which they become a resident for tax purposes. A secondary ‘day count’ test will apply if the first test fails, accompanied by a ‘Factor Test’, which takes into account four secondary factors. Only two need to be met for an individual to meet taxpayer criteria.
The domicile test	Applied when individuals don’t ‘reside’ in Australia under the first test but are typically ‘domiciled’ in Australia unless permanent place of abode has been established outside Australia.	This test is expected to be repealed for individuals that are not in Australia for the majority of the income year and replaced with the ceasing residency test based on a clear day count and objective Australia-focused factors.
The 183 day test	Applied to individuals who don’t ordinarily reside in Australia but who do stay in Australia during the financial year. If the individual stays for more than 183 days, they may be assumed to be a resident unless they can demonstrate a usual place of abode outside Australia and no intention to take up residency here.	This will become the primary test for residency, as indicated above.
The superannuation test	Applied to determine if individuals are members of certain Australian Government super funds and it also treats spouses or children under the age of 16 as residents.	This will be replaced by the Overseas Government Officials Test for Australian nationals posted overseas in foreign service.

THE COMPLICATING FACTOR OF COVID

The Government's announcement of easing residency rules came amidst increasing anxiety and confusion about how individuals and companies would be impacted by government directives, such as closure of borders or restricted travel, the introduction of stimulus measures, and the application of tax rules.

Tax treaties treat individuals as being resident in only one country at a time (their treaty residence) and as mentioned above, domestic tax laws may mean that an individual is considered a tax resident in two jurisdictions at the same time.

Tie breaker rules may determine that individuals impacted by COVID-related restrictions are 'temporarily' resident because they became stranded in Australia (or Australians offshore) and are unable to return home until restrictions ease.

Individual tax jurisdictions are starting to provide guidance on the impact of the pandemic on domestic and tax treaty determinations for the residency status of individuals and organisations. Australia's guidance is that where a person is not an Australian for tax purposes, they are temporarily resident due to the pandemic and will not become resident for tax purposes.

The ATO's view appears to be that COVID has created a special set of circumstances that must be taken into account when the individual is undertaking employment in Australia that would otherwise have occurred in their usual country of residence had they been able to return. The caveat is that the working arrangement is short-term (three months or less) and that the employment income will not have an Australian source.

WHEN YOU SHOULD SEEK ADVICE?

Residency is complicated and has been made more so by COVID for both Australian residents caught overseas and for foreign residents stranded in Australia. We strongly urge anyone affected by COVID restrictions to seek a review of their circumstances to ensure that they are prepared for any tax implications based on the nature of their employment, how long they are likely to remain within Australia's borders (or offshore), and to ensure that they are clear on any obligations they may have.

Please contact us on 02 9957 4033 for further guidance or to discuss your situation with an international tax specialist.

Last updated July 2021. This factsheet is provided for information purposes only and is correct at the time of publishing. It should not be used in place of advice from your accountant. Please contact us on 02 9957 4033 to discuss your specific circumstances.

ABOUT US

Our Expertise

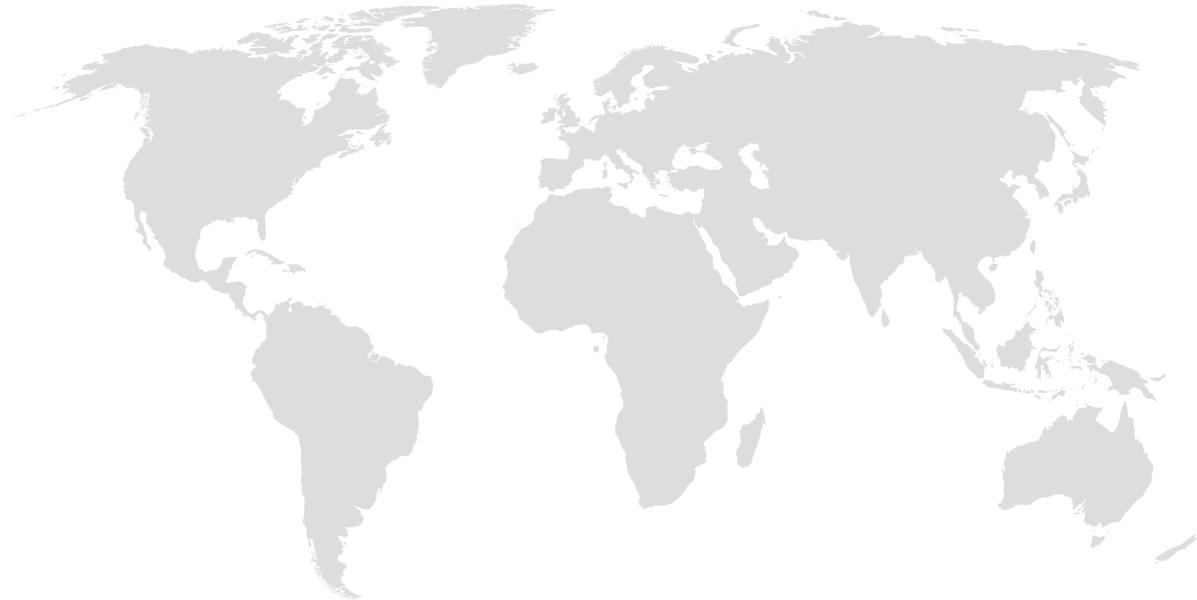
Domestically

Bates Cosgrave advises domestic and international businesses.

We provide highly personalised services across a wide range of industries with in-depth knowledge in real estate, renewable energy, import and distribution, health professionals, inbound and outbound investments, and innovative/start-up businesses.

Internationally

Although we are a boutique firm based in Sydney, we have access to a strong global network and specialise in advising cross-border transactions and global structuring.



OUR TEAM

Directors



MATT ZHOU

DIRECTOR

CA, B. COMM, M. ACC, M. TAX, MINTAX, CTA

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Matt joined Bates Cosgrave in April of 2007 as a manager and was promoted to Director from 1 July 2009. Matt has a reputation for his technical expertise and experience in specialist advice to professionals including medical doctors, professional investors and family offices, multinational companies.

His diverse knowledge on International tax, expatriates tax, employee share schemes, business structuring including cross border issues, CGT and GST is formidable.

His industry knowledge is broad and includes medical services, real estate, pharmaceuticals and technology companies. As tax advisors, we must think ahead and consider not just the current situation but the future.

Good advice reflects not simply value now, but lasting value.



GLENN COSGRAVE

DIRECTOR

CA, B.COMM, FTIA

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Glenn is passionate about business improvement and works with our clients to get the fundamentals of their business right, serving as a mentor through their business journey of establishment, growth and exiting when the time is right. His approach has helped many businesses evolve from start-up to commercialisation and ultimately setting up their business in the best possible position for sale. He also specialises in tax-efficient structuring. Glenn's extensive experience as a strategic advisor ensures his clients have a clear focus for their personal and business goals, including a roadmap for future success and alignment of multidisciplinary advice to achieve best outcomes. Glenn is also a professional adviser to engineers, valuers, project managers, accountants, lawyers and high net worth individuals, with a strong portfolio of clients in import and distribution, professional advisory and innovative businesses.



contact us

Bates Cosgrave Chartered Accountants

Ground floor, 123 Walker Street

PO Box 497

P: +61 2 9957 4033

North Sydney NSW 2060

North Sydney NSW 2059

F: +61 2 9964 0610

E: enquiry@batescosgrave.com.au

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www.batescosgrave.com.au

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