Volume 57(11)
June 2023

The Tax Institute

Taxation *in* Australia

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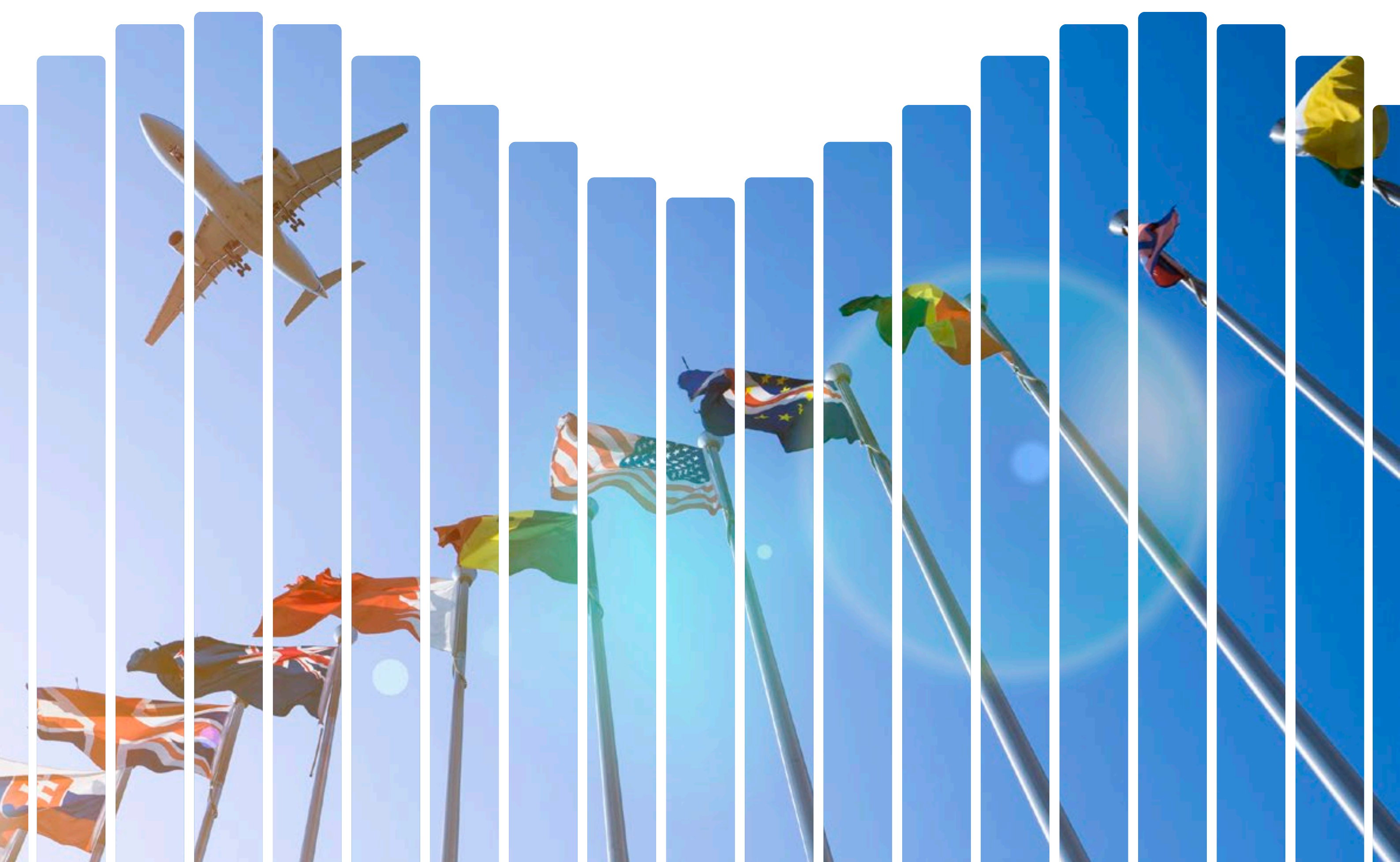

Australian expatriates: casualties of law

by Matthew Marcarian, CTA,
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Over the last 20 years, Australia's international tax settings have changed in a way which has increased the tax burden on Australian expatriates. Too often they become "casualties of law", their interests overlooked by poorly conceived, and sometimes politicised, tax policy and design. This article examines these changes and analyses major tax issues facing Australian expatriates at different stages of their expatriate journey. The article demonstrates how Australian expatriates can face higher taxes and significantly more complexity than fellow Australians. The tax issues examined include the ongoing legislative uncertainty relating to individual and corporate tax residency, the removal of both the 50% CGT discount and the main residence CGT exemption for non-residents, the forex rules, the treatment of foreign structures, and overseas retirements plans. This article also notes that an opportunity exists for the new Albanese government to address many issues to make them less burdensome and fairer for the Australian "diaspora".

Introduction

In post-lockdown Australia, our citizens are once again on the move, in search of new opportunities in "Expatland".[1] This continues a healthy trend which has been described as a significant phenomenon for our country[2] – an Australian "diaspora" which can offer many benefits to the nation if properly engaged.

In 2005, the report of the Senate inquiry *They still call Australia home* observed that:[3]

> "… expatriate Australians represent an underutilised resource: not only are they an asset in terms of promoting Australia and its social, economic and cultural interests; they are also ambassadors for our nation, which is otherwise disadvantaged by our geographic remoteness and small population."

In 2003, a landmark study published by the Committee for Economic Development of Australia[4] (the Hugo report) found that the main reasons Australians moved overseas included better employment opportunities, professional development, higher income, promotion/career advancement and lifestyle.[5] Australia's lock-down policy has not changed these motivations.

Since Australia's borders were opened on 1 November 2021,[6] more than 250,000 "residents of Australia" have departed on a long-term basis.[7] According to the "population clock" of the Australian Bureau of Statistics, one Australian resident leaves Australia every two minutes to live overseas.[8]

Most departing Australians become a non-resident of Australia under tax law and the majority of those will one day return.[9] These Australians will have to navigate increasing complexity in their tax affairs. They may become casualties of law and find themselves worse off than their resident compatriots as a result.

More should be done to reduce the complexity of Australia's international tax laws, a burden which affects a broad cross-section of taxpayers but falls disproportionately on Australian expatriates. From their perspective, various inequities have crept into our tax system, without appropriate explanation or policy rationale. Some tax changes have been highly politicised.

The introduction of Div 775 of the *Income Tax Assessment Act 1997* (Cth) (ITAA97),[10] and the amendments to s 23AG of the *Income Tax Assessment Act 1936* (Cth) (ITAA36),[11] have increased the uncertainties facing Australian expatriates.

Tax residency has become a more critical matter than ever before. Dramatic changes to our capital gains rules have been ushered in and the concepts of simplicity and equity have been abandoned.[12]

This article examines some of the key tax issues for Australians at various stages of their expatriate journey, whether they are departing, returning or living abroad:

- departing Australians must now consider whether a proposed move abroad may be financially detrimental, relative to staying in Australia;
- returning Australians face a tax system full of traps for the unwary, which sometimes results in punishing fiscal outcomes; and
- Australians still living abroad must monitor proposed Australian tax changes to avoid the pitfalls which may come with the lack of any consistent political representation at home.[13]

Definitions

Before moving on, it is useful to define the terms "Australian expatriates", "departing Australian" and "returning Australian".

For the purposes of this article, an "Australian expatriate" means an Australian citizen who lives overseas[14] and who is also a non-resident of Australia.

A "departing Australian" is an Australian resident citizen[15] who will cease Australian tax residency when they leave Australia.

A "returning Australian" is an Australian citizen who has returned to Australia and who will become a resident.[16]

We will also resist using the expression "foreign resident" in favour of the much clearer and less emotive term "non-resident".

Departure issues

Residency and salary income

For most departing Australians, the taxation of their salary income will be top of mind as they plan their move overseas.

In the author's experience over two decades of practice, many have asked whether Australia will be able to tax their overseas salary when they move. Some realise that the more precise question is whether they will become a non-resident. Fewer still understand that a tax treaty might shelter their overseas employment income from Australian tax even if they remain resident.

Before 1 July 2009, most departing Australians would have had certainty about the taxation of their salary income, including those individuals whose actual residency status may have been unclear. This was because there was an exemption from Australian tax for the foreign earnings of an Australian resident engaged in "continuous foreign service" for at least 91 days, provided the income was subject to tax in the foreign country (s 23AG ITAA36).

While the administration of s 23AG was not always straightforward,[17] the exemption had appeal. Its purpose was to relieve many small taxpayers of the burden of having to declare their income and claim a foreign tax credit, where in many cases the tax differences were minor.[18]

In 1986, the original objective of s 23AG was:[19]

> "to provide an exemption from Australian tax for salary or wages earned overseas by an Australian resident during a continuous period of at least 12 months … provided … that the income is not exempt from tax in the country in which it is derived."

The government was not concerned with what tax rate applied to the income. There was an artful simplicity to that approach.[20] The section provided a full exemption from Australian tax if there was continuous foreign service for at least 365 days and there was a proportional exemption for service between 91 days and 364 days.[21]

In 1991, in a bid to simplify tax laws, amendments were passed[22] to introduce a full exemption for taxpayers provided they had continuous foreign service of at least 91 days.

The explanatory memorandum (EM)[23] explained that the proportional exemption provision involved "significant compliance and administrative costs" and required "individual taxpayers to perform a number of complex calculations to determine their period of foreign service, the proportion of that income subject to exemption and the taxation liability of any non-exempt portion of that income".

The changes were introduced to "substantially simplify the law and hence reduce compliance and administrative costs" removing "unwarranted complexities in calculating tax liabilities".

By 2009 however, the philosophy of government had changed.

In a surprise move, the 2009–10 Budget measures[24] indicated that the government would change its policy towards "Australians working overseas". It was a clumsy statement that should have more accurately referred to "Australian tax residents" working overseas.[25]

The Budget measures noted that the original intent of s 23AG was "to relieve double taxation" but its view was that "in practice little foreign tax may actually be paid on the foreign income concerned".[26] It decided to amend s 23AG to limit its application for most taxpayers.

The Budget measures also noted that taxpayers would instead have to rely on the general foreign income tax offset system to obtain relief from double taxation. The government did not mention, but should have, that double tax treaties may have also provided exemptions for many taxpayers.[27]

When the amending Bill was introduced,[28] the EM noted that the existing exemption could produce:[29]

> "non-neutral tax outcomes between individuals working in different countries, with different tax rates and between individuals working overseas and individuals working in Australia."

The new approach was said to be consistent with the "general principle that individuals who are Australian residents for tax purposes should pay tax on their worldwide income".[30]

The government also wished to lower "administrative costs for the Australian Taxation Office"[31] which it said devoted "significant resources to providing interpretive advice on the operation of section 23AG".[32]

Limiting the scope of the exemption would "help maintain the integrity of the tax system by ensuring that most Australian resident individuals face the same tax burden in relation to their worldwide income".[33]

In Bills Digest no. 158 of 2008-09, the government put it slightly differently:

> "The Treasurer stated in a media release on 12 May 2009 that the new measure is designed to ensure that workers who earn income overseas do not have an unfair advantage over workers who earn income and pay tax in Australia. The Government wishes to make the exemption fairer by ensuring that Australian resident taxpayers who work in low-tax jurisdictions pay the same rate of Australian tax as those taxpayers who work in Australia."

The true motivation was likely to have been revealed in the Bills Digest. Australians living and working in low-tax jurisdictions seemed to be the cohort that the amendments were most concerned with. However, no statistics were

released to explain the number of Australians living in the relevant "low-tax jurisdictions", nor how many of them should still be considered Australian residents.

For Australians who had not quite departed in the traditional sense, the removal of the 90-day exemption was a major issue. The repeal of that exemption meant that the "safety net" for many simple taxpayers was removed, resulting in increased complexity for those moving overseas on relatively short-term assignments.

Inevitably, the correctness of the "residency assertion" for those Australians was brought sharply into focus. It resulted in an apparent explosion of cases on residency in the courts.[34]

Timing became a significant issue. It became critical to determine whether a departing Australian was a non-resident from the actual day of departure or some later day.

Interestingly, the Board of Taxation has noted that the previous exemption in s 23AG provided practical certainty and significant administrative and compliance relief for employees and employers, at the limited notional cost to the government.[35]

> "… right the wrong perpetrated on the Australian diaspora by reinstating the main residence exemption …"

For non-resident Australians, the amendment to s 23AG did not have any direct consequences. However, it increased the risk of error. Previously, if they had erred with the position taken in relation to personal tax residency, the consequences would have been mostly limited to liability on foreign investment income and capital gains.

With the changes to s 23AG, there could be significant additional tax due on foreign salary income, unless that income was protected by a treaty.

The changes also had an impact on the taxation of some returning Australians, which is discussed later in this article.

Residency rules: changing or not?

For most departing Australians, the question of whether they will become a non-resident when they leave Australia can be relatively easily answered under our current rules. Most will have straightforward personal circumstances and will establish homes in a new country of residence. A small percentage could be described as itinerant and would still be a resident here.

Our existing residency rules are mostly well understood, and following *Harding's* case,[36] we now have greater clarity about the expression "permanent place of abode".

Inevitably, there are complicated cases where it can be unclear whether a departing Australian has ceased residing in Australia or alternatively whether they have established a "permanent place of abode" overseas. Sometimes returning Australians find it difficult to determine when they have commenced tax residency.

While uncertainties remain, a far bigger issue is that we have significant uncertainty about what our residency laws will be.

Legislative uncertainty

Moving overseas is almost always a major undertaking and certainty about the tax consequences should be fundamental. Unfortunately, there is now considerable uncertainty about what will happen to our residency rules, making it difficult to advise taxpayers even about relatively short time periods.

In the 2021–22 Federal Budget, the Coalition announced that a new "modernised framework" for Australia's residency laws would be introduced. It was to be based on a report by the Board of Taxation[37] completed in March 2019.

The key reform was to be the introduction of a "bright line" 183-day test, and "other secondary tests" which would depend on a combination of physical presence and other "objective criteria".[38] For such a major measure, insufficient detail was provided in the Budget and it has provoked significant concerns. The reference to the 183-day bright line test was clear enough. But it was the imprecise reference to "other secondary tests" that caused consternation in expatriate circles.

A review of the Board's report indicates that the "other secondary tests" included a "ceasing residency test" and a "commencing residency test". If the government had accepted the Board's entire framework, it should have mentioned those tests explicitly, without leaving it to the public to read between the lines.

There is justified concern that aspects of these tests are unworkable and that the attempt to codify common law principles into these secondary tests is not appropriate.[39] Specifically, the notion that an Australian could be considered a resident if they spend more than 45 days in Australia in a tax year is anathema to many. With memories of 14-day quarantine periods still fresh, a "45-day rule" could effectively limit time in Australia to 30 days if quarantine rules were to be re-imposed.

Horizontal equity issues contained in the proposals need to be dealt with also,[40] and one can anticipate a range of interpretational problems arising with several elements of the secondary tests.

Unfortunately, it has been almost two years since the announcement and Australian expatriates have been left hanging.[41] If the new government wishes to continue with the changes, it should make an announcement soon and ensure genuine and extensive consultation on any draft legislation.

There is an opportunity now to engage with Australia's expatriate community in a transparent way, to show that the new government is more willing than its predecessors to consider their views. The aim should be to avoid imposing

harsh approaches to a segment of the Australian population that has been unfairly treated in recent times.

CGT event I1

CGT event I1 occurs when an individual "stops being a resident". At the cessation of residency, a gain or loss arises on all CGT assets, excepting taxable Australian property.[42] As this can create funding problems, the law permits individuals to make a choice to disregard CGT event I1.[43] That "choice" is a good thing. However, it must be recognised that the removal of the CGT discount for non-residents has increased the complexity relating to that choice.

If the choice is made, the relevant assets become taxable Australian property. The assets remain in the Australian CGT net, and a gain or loss will arise on the happening of a later CGT event.

Where a gain is made, the benefit of the 50% CGT discount is reduced in the proportion that the non-resident ownership period bears to the total ownership period. This can result in much higher effective tax rates, depending on the individual situation.[44]

Some departing Australians may be able to avoid higher effective rates if they end up selling the relevant asset while they are resident in certain treaty countries, to whom Australian has allocated taxing rights. Take, for example, Australia's treaty with the United States which contains this concession at art 13(6):

> "An individual who elects, under the taxation law of a Contracting State, to defer taxation on income or gains relating to property which would otherwise be taxed in that State upon the individual ceasing to be a resident of that State for the purposes of its tax, shall, if the individual is a resident of the other State, be taxable on income or gains from the subsequent alienation of that property only in that other State."

However, if the departing Australian moves back to Australia and then sells the particular asset, they would be assessable in Australia again at higher effective rates compared to other fellow Australians.

There is also the possibility of the Australian expatriate moving to a third country (either to a non-treaty country or to a treaty country to which Australia has not allocated taxing rights) and the departing Australian would again be assessable, at likely higher effective rates. Hence, the ongoing compliance difficulties of making the election to disregard CGT event I1 should not be overlooked. Doing so will require the departing Australian's journey through "Expatland" to be tracked before an accurate tax return can be prepared.

Self-managed superannuation funds

Given the prevalence of self-managed superannuation funds (SMSFs), it would be remiss not to mention that departing Australians with SMSFs have some work to do to ensure that their funds remain "complying". That can be done by ensuring that central management and control of the fund remains in Australia[45] and ceasing contributions. This is another point of complexity and cost for a departing Australian which could be addressed by simple amendment.

Issues while away

Removal of 50% CGT concession for foreign residents

On 8 May 2012, the Labor Government announced that it would legislate to prevent "foreign residents" from accessing the 50% CGT concession. The changes were introduced as part of the Tax Laws Amendment (2013 Measures No. 2) Bill 2013.

The EM to the Bill gives few clues as to the policy behind the changes. The EM indicated that:[46]

> "the reduction in effective tax rate (by way of the CGT discount) is not necessary to attract foreign investment in these assets. Removing the CGT discount for foreign and temporary residents increases the return to Australia from gains made through foreign investment in Australian land."

This explanation was unsatisfactory in two respects.

First, the implication that the CGT discount was introduced to attract foreign investment was not correct.[47] Second, the explanation failed to consider the tens of thousands of Australian expatriates with ownership of Australian land.

It is fallacious to suggest that ownership by Australian citizens living abroad should constitute "foreign investment". Unfortunately, the result has been that Australians living overseas have borne higher tax rates on capital gains from real estate than their fellow resident Australians. If the aim was to make the foreigners pay more, it is doubtful whether that objective has been achieved.

Relatively few "foreigners" would have paid top marginal rates on large capital gains. Those who had held Australian real property on the date of the announcement would have been entitled to some CGT discount, given the transitional rules.

Those purchasing new properties after the change would most likely have purchased using a company, with the result that capital gains would attract only the company tax rate.[48] Transfer pricing techniques could have reduced the effective tax rate further.

Therefore, the notion that eliminating the 50% CGT discount for *foreigners* would have raised significant additional revenue should be questioned.

It is also hard to justify the horizontal inequity of the situation for Australian citizens when one considers that real estate is also a major asset class for Australian expatriates. Their ties with Australia make them less likely than actual foreigners to change their purchasing behaviours and therefore the burden of higher tax rates falls disproportionately on them. For example, Australians living overseas are far less likely to take the approach of utilising a company to acquire real property in Australia.

Usually, Australian expatriates acquire properties which they hope to hold for the long term, after they return to Australia, either because they consider that the property will become their main residence or because it will be a long-term investment property.

With these objectives in mind, the use of a company would prohibit access to any CGT concession that would otherwise be available following their return to Australia.

How the 50% CGT discount is reduced for non-residents

The policy which grandfathered existing assets from the change was poorly conceived. Rather than grandfathering existing assets owned on 8 May 2012, it was the "value increase" up to 8 May 2012 that was grandfathered. That approach has introduced unnecessary complexity into the administration of the CGT system for all stakeholders because of the need to apply the convoluted formulas set down in s 115-115 ITAA97. To obtain the benefit of the grandfathering, the non-resident must ascertain the market value of the property on 8 May 2012 as the example below illustrates.

Example

Assume that an Australian non-resident had acquired an investment property on 1 July 2008 for $750,000, had returned to Australia on 1 July 2018, and had sold that property on 30 June 2020 for $1,750,000. Assume that the market value of the property on 8 May 2012 was $1,100,000.

Section 115-115 essentially gives the taxpayer access to the 50% CGT discount only if they choose to calculate the discount percentage using the "market value" method contained in s 115-115(4).

In this example, and assuming that a satisfactory assessment of market value is obtained, the formula in s 115-115(4) produces a discount of 26.7%.

Otherwise, s 115-115(5) requires taxpayers to calculate the applicable CGT discount by reference to the number of days they were a resident over the total ownership period.

Essentially, the formula has the effect that the 50% CGT discount is reduced by the proportion of days the person is resident during the holding period.

In this example, the person is resident for 1/6 of the period and so the CGT discount is not 50% but 8.33%.

The cost of compliance to secure the discount is not insignificant. An assessment of market value by a valuer, along with cost of advice from a tax professional, can be expensive.

Taxes have also become a disincentive to sale. In the author's experience, many Australian expatriates have opted not to sell Australian properties, precisely because the removal of the CGT discount provides such a bad tax outcome.

The prospect of high effective tax rates for Australian non-residents may well have contributed to a "lock-in effect" for Australian real property over the past decade. That would surely not have assisted with housing affordability, an issue which the Coalition politicised in 2018 when it legislated to remove the main residence exemption for non-residents.

Removal of the main residence CGT exemption

In the 2017–18 Federal Budget, the Coalition announced that it would legislate to remove the main residence exemption for "foreign investors". In the Budget speech delivered on 9 May 2017, the Treasurer explained the government's measures to address housing affordability. The following extract from the Treasurer's speech reminds us of the political context at the time:

> "And on demand management, we will continue to prefer the scalpel to the chainsaw, to avoid a housing shock.
>
> Mum and dad investors will continue to be able to use negative gearing, supporting the supply of rental housing and placing downward pressure on rents.
>
> Our regulatory agencies will continue to use the flexible and calibrated controls they have available.
>
> And we will legislate to extend APRA's ability to apply controls to the non-ADI sector and explicitly allow them to differentiate the application of loan controls by location.
>
> Even tougher rules on foreign investment in residential real estate will be introduced, removing the main residence capital gains tax exemption, and tightening compliance.
>
> We will also apply an annual foreign investment levy of at least $5,000 on all future foreign investors who fail to either occupy or lease their property for at least six months each year.
>
> And we will restore the requirement that prevents developers from selling more than 50 per cent of new developments to foreign investors."

Preserving benefits to "Mum and Dad investors" while "getting tough" on foreigners was clearly the mantra. The Treasurer did not explain that getting tough on foreigners would also mean getting tough on tens of thousands of Australians living overseas, many of whom were also "Mums and Dads".

Indeed, in the Budget papers, the proposal was explained in quite different terms as follows:

> "The Government will extend Australia's foreign resident capital gains tax (CGT) regime by … denying foreign and temporary tax residents access to the CGT main residence exemption from 7:30PM (AEST) on 9 May 2017 …"

The truth was laid bare. The proposal would potentially affect thousands, if not tens of thousands, of Australian expatriates, impacted by dint of being non-residents for

tax purposes, but not because they were part of some undesirable cohort.

It was never explained how the removal of the main residence CGT concession for "foreigners" would address housing affordability.

It took two months before the Treasurer acknowledged that the proposal would affect non-residents generally and not simply foreigners or "foreign investment".

On 21 July 2017, in a boldly titled media release, "Helping Australians realise their dream of home ownership",[49] the Treasurer and Assistant Minister noted:

> "The Turnbull Government is also today releasing draft legislation to stop foreign residents investing in residential real estate claiming the main residence exemption.
>
> The Government will stop foreign tax residents from claiming the main residence capital gains (CGT) exemption when they sell property in Australia from Budget night 2017."

When describing the revenue impact of the change in the media release, the Treasurer and Minister explained that the target was "the foreign investor". They noted that: "These changes to foreign investors buying residential real estate are part of a package estimated to add $600 million in revenue over the forward estimates."

The whole tone of the media release was confused. Was the removal of the main residence exemption aimed at foreign investors, foreign residents, or foreign tax residents?

Whatever the truth, the suggestion was that foreign residents in their droves had been buying up Australian real estate and claiming the main residence exemption unfairly. Not a skerrick of evidence was advanced to support that contention.

On the same day as the media release, Treasury opened its consultation on the measure. It was entitled "Housing tax integrity – Capital gains tax changes for foreign residents".[50] It contained not a single reference to "foreign investors".

The Tax Institute, in its submission[51] to Treasury, noted that the policy behind the measure appeared "somewhat confused". It requested the government explain the abuse that it was trying to prevent. It also noted that it could find "no legitimate policy reason for denying Australian citizens the CGT main residence exemption" simply because they were foreign residents at the time of sale, flagging the potential for the changes to produce unfair and arbitrary results. None of The Tax Institute's equity concerns were addressed.

Instead, on 8 February 2018, the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018 (the 2018 Bill) was introduced into the House.

The Treasurer, in his second reading speech,[52] continued his trademark approach to all things "foreign", stating that:

> "No longer allowing foreign residents to claim this exemption will send a clear message that foreign residents will have to comply with our stringent capital gains tax rules."

A week later, Michael Pascoe, writing in the *Sydney Morning Herald*,[53] hit the nail on the head when he said:

> "Ordinary expats have become collateral damage in the government's 'Australia First' chest-beating as it cracked down on foreigners buying residential real estate."

On 1 March 2018, the Assistant Minister to the Treasurer found yet another way to describe the proposed change. He explained that the Bill:[54]

> "delivered on the government's commitment to implement tighter rules for foreign residents owning Australian property."

Labor's interest in the Bill at that time was to ensure that New Zealand citizens were not adversely impacted and that Australian tax residents could still access the CGT exemption. It called for a Senate inquiry.[55]

The Senate inquiry was handled by the Senate Economics Legislation Committee[56] (the Committee) which sought public submissions. The submission from CPA Australia concluded that:[57]

> "It is unreasonable to effectively penalise Australians for departing Australia for work or personal reasons by revoking their right to a CGT exemption on their family home."

Many other submissions expressed similar views.[58] Some echoed The Tax Institute's recommendation from its 2017 submission to Treasury[59] that a partial main residence exemption should be allowed relating to the period of residency.[60]

The Committee even noted a submission from the Affordable Housing Consortium which expressed the view that the proposed changes could work to suppress the supply of housing stock by discouraging the sale of properties.

Given those concerns, one would have expected the Committee to have sought some economic modelling from the government to ascertain how the measure would reduce pressure on housing affordability. No such modelling appears to have been requested. It is doubtful that any existed.

Notwithstanding the apparent lack of substance, the Committee's concluding view was that:

> "the measures contained in the Bill will form an essential part of the government's comprehensive and targeted plan to improve outcomes for Australians across the housing spectrum."

None of the concerns swayed the Committee. It recommended that the government proceed with the legislation, noting it had a "responsibility to ensure that Australian citizens working overseas were made aware of the changes", essentially washing its hands of the matter.

The EM that introduced the 2018 Bill also provided no details about the policy behind the measure. There was no

reference to economic analysis about how the measure would reduce pressure on housing affordability.

Fortunately, there were continuing objections to the unfairness of the proposals[61] which gathered steam.[62]

The late Mr Paul Drum, head of CPA Australia at the time, said:[63]

> "The government has not put forward reasons as to how it is good public policy that the CGT laws be changed retrospectively and to the detriment of taxpayers … it's draconian to change the tax treatment of the family home post the acquisition of that home – and for some citizens that are now non-residents, it may have been their family home for more than 30 years."

It was called "unjustifiably bad policy".[64] Under sustained pressure from many quarters as to the fairness of the measures, including from Labor,[65] the Coalition appeared to drop the measure in March 2019[66] in the run up to the 2019 federal election. But Australian expatriates had only a short reprieve. Not long after the Coalition's re-election in May 2019, it announced its intention to revive the measure.[67]

Significant objections to the policy continued. *The Australian Financial Review* labelled it a "zombie tax measure".[68] Professor Robert Deutsch called the proposal "outrageous"[69] and "draconian".[70]

As for the passage of the revived Bill,[71] there was no discussion in either House about the well-documented equity concerns.

Labor appeared exhausted by the process and the shadow Treasurer noted his party's efforts to make "what was a bad Bill in 2017, a better Bill".[72] By this, he referred to much-needed amendments to allow foreign residents to access the main residence exemption if certain "life events"[73] occur – those being death, divorce or terminal illness. Those concessions did not go far enough.[74] The effective date was extended to 1 July 2020 and the Bill was passed.

Where are we at now?

Section 118-110 ITAA97 now prevents an "excluded foreign resident"[75] from benefiting from the main residence exemption. No regard is had to the amount of time the excluded foreign resident lived in the home while they were a resident of Australia.

Unquestionably, the door has been left open for those taxpayers who can afford to hold the property until they become a resident in Australia again. If an excluded foreign resident retains their property, selling it after they return to Australia, they will be able to access a full or partial main residence exemption. In that case, the CGT exemption is not curtailed by the period of non-residency. That is cold comfort for those who were pressured to sell their homes prior to 1 July 2020, during the height of lockdown.[76]

In the end, one is left with the sinking feeling that, all along, the policy was aimed at foreign nationals – but that Australian expatriates had become casualties of law.

Those expatriates caught unaware of the change will suffer a potentially life-changing tax event, relative to other fellow Australians. Those who are aware have nonetheless had an unfair and unjustified economic constraint foisted on them.

There is no evidence that the government ever took seriously the Committee's reminder of its "responsibility" to ensure that Australian citizens abroad were made aware of the changes. This raises significant questions about due process.

Was this revenue raising under the guise of housing affordability?

In the author's view, the Albanese Government should reinstate the main residence exemption so that Australian citizens abroad are not discriminated against. If that means allowing foreign nationals access to the exemption, that is only fair. After all, under the old law, a foreign national could only have claimed the main residence CGT exemption if they had permission to acquire the property, and if they had lived in the property and used it as their main residence. That is all our law required of them.

The ATO will also have ample opportunity to review main residence claims, given that the foreign resident CGT withholding regime is now in place.

In the author's experience, most departing Australians are now electing to retain their former main residence for fear that selling their Australian property will only make it harder to buy back into the market once they return to Australia.

Returning issues

They still call Australia home,[77] but the returning Australian can face a myriad of complexity. Having had a life outside Australia, they are likely to have their finances structured in a way which does not necessarily provide for a happy tax homecoming.

Few of Australia's international tax rules contain de minimis exemptions or time periods which could permit the returning Australian an exemption on the grounds of simplicity. Where there are exemptions or concessions, they have serious shortcomings and amendments should be made to address these. Some of these problems are elaborated on in the next section of this article.

Employment income: tax derivation time

Since the amendments to s 23AG, returning Australians now face a tax liability on income received after they become a resident, which may relate to services rendered before returning to Australia. This is because of the common law principle that employment income is assessable on receipt.

When one realises that "temporary residents" who come to Australia are treated quite differently with respect to their employment income (they are not taxed unless the work relates to services performed after they become a "temporary resident"[78]), the outcome for the returning Australian seems inappropriate.

Foreign termination payment exemption

One exception to the treatment of employment income for a returning Australian is the exemption for "foreign termination payments" in s 83-230 ITAA97. That section permits an Australian resident to treat a termination payment as non-assessable, non-exempt income if certain conditions are satisfied. Essentially, the payment must be received "in consequence of" the termination of employment and it must relate wholly to foreign service.

The main problem is that no apportionment is possible between Australian and overseas service periods. A returning Australian will be assessable on the whole termination payment even though the period of Australian employment may comprise only a small part of the service period. That is strongly at odds with many other approaches to taxation in Australia where apportionment is the norm. This issue could easily be fixed by simple amendment.

Australians returning with foreign entities

Many returning Australians will come home either owning or controlling foreign companies or trusts. More often than not, such structures are established without the intention of obtaining a future Australian tax advantage. But our tax system inherently treats foreign structures in a harsh manner as if the only reason for their establishment was Australian tax avoidance.

Returning Australians will need to consider:

- whether foreign companies or trusts are residents of Australia;
- whether and to what extent the controlled foreign company (CFC) rules apply;
- whether and to what extent Div 6AAA ITAA36 applies; and
- whether their personal presence in Australia constitutes a permanent establishment of a foreign company

These areas of law are more complex than most returning Australians imagine. Many months of planning may well be required ahead of a return to Australia.

While a detailed discussion of these laws is beyond the scope of this article, there are certain stand out issues which are discussed below.

Corporate residency rules

As with our individual tax residency rules, there is disappointing lack of certainty about what our company residency rules will be.

On 6 October 2020, the government announced that it would make technical amendments to the corporate residency test. It would essentially introduce a new "significant economic connection" test, adopting a proposal by the Board of Taxation.[79] This new test will be satisfied where a company's "core commercial activities" are undertaken in Australia and where its central management and control is also in Australia.

While the concept of central management and control is well understood, having been clarified most recently in *Bywater*,[80] the new proposed "core commercial activities" test is not well understood. In the absence of legislation, reference must be made to the Board's report to understand what is meant.

The main trouble with these reforms is that they have stalled, compounding uncertainty for returning Australians who might have ownership of private companies incorporated overseas.

Trust residency

A longstanding issue is that a non-resident trust will become a resident trust for Australian tax purposes if any of its trustees become residents of Australia. That outcome is sudden and unforgiving. Even if there are several trustees in office, merely one trustee becoming an Australian resident is enough to create unwarranted complexity and cost.

If a foreign trust accidentally becomes a resident of Australia (because an individual trustee may have simply moved to Australia), Australia can levy taxation on capital gains in a situation where an overseas trust holds only foreign assets, even if there are no Australian resident beneficiaries or transferors. That outcome is difficult to accept but no attempts have been made to address this problem.

CFC rules

The CFC rules[81] are a famously complicated. They are concerned with preventing the deferral or avoidance of Australian tax on tainted income.

The rules are fraught with interpretational challenges and can produce results which are hard to reconcile with anti-avoidance goals. They often apply to normal commercial structures where there is no avoidance purpose.

The main issue for returning Australians is the lack of any de minimis exemptions.

The owner of a small overseas business must contend with the same CFC rules as a large multinational when determining whether there is any "attributable income" that must be included in assessable income.

The active income test[82] permits a CFC to have less than 5% of its turnover comprised of tainted income, without attribution. However, working through the concepts just to get to a 5% exemption is no mean feat. It would be far better to have an exemption by value, or even a wholesale exemption from the CFC rules for small companies or small businesses.

A simplifying policy, such as not applying the CFC rules at all unless certain profit/turnover tests are met would be welcome.

Australians returning with foreign currency

The forex realisation events in Div 775 ITAA97 require the recognition of forex gains and losses arising from specified "forex events". These provisions have always been an

unwieldy and confusing set of rules to apply. Even the most sophisticated clients find the rules incomprehensible.

In 2006, The Tax Institute wrote to the Board of Taxation in blunt terms as follows:[83]

> "The rules in Division 775 are of such complexity and incomprehensibility that they are at risk of being ignored in practice. This does not mean that foreign exchange gains and losses are not being brought to account but rather, people are favouring common sense accounting-type approaches, rather than trying to divine which particular forex realisation event (FRE) applies to each step of the transaction."

Problems with Div 775 were identified early, and in 2004, the government announced that it would:[84]

> "amend the foreign currency provisions of the income tax law to extend the scope of a number of compliance cost saving measures in the law, and to make technical amendments to ensure that the provisions operate as intended."

Unfortunately, the announcements died a natural death. Writing for *The Tax Specialist* in 2008, Fiona Dillon noted that the failure to persevere with much needed improvements to Div 775 had:[85]

> "left both practitioners and administrators in the awkward position of knowing the forex law applicable to relevant transactions is subject to be retrospectively amended, and yet not knowing with any real certainty what that law as amended may say."

While the forex rules apply to all resident taxpayers with foreign currency accounts, returning Australians run into these excruciating rules more often than most.

Returning Australians usually come home with foreign bank accounts of some description. Some Australians will have active foreign accounts, whereas others may just keep an account open with a small balance.

Policymakers should realise that Australians living abroad have no reason to seek Australian tax advice at the time they open these accounts. Therefore, many are not expecting to deal with the tax complexity that awaits them in Australia. Indeed, there is no separately identified disclosure required in relation to foreign exchange gains or losses in an individual income tax return.[86] Unless the right questions are asked, the issue will often be missed and the returning Australian will be none the wiser.

Even if the returning Australian becomes aware of the issue, there is no grace period, such as a "six-month-rule" for foreign bank accounts, which might permit a returning Australian to repatriate funds without tax consequences after arriving home.[87]

Tax professionals can help clients to identify whether exemptions or simplifying approaches can be utilised. If clients cannot be exempted from the provisions, the next task is to identify whether any of the forex events have occurred and to quantify the relevant assessable income or allowable deductions.

Specific forex problems

For the majority of returning Australians, the main forex realisation event of relevance is forex realisation event 2, which arises simply where funds in a foreign bank account are "used".[88] That is an absurd outcome but it is what the law presently requires.

Although there are many difficulties with Div 775, two common scenarios are raised below which illustrate problems and uncertainties commonly faced by returning Australians.

Example 1 analyses the "private and domestic exemption" which is often thought to be useful to avoid unintended results. By its very length, it demonstrates the need for reform.

Example 2 illustrates a problem that is often caused by forex gains and losses being on revenue account.

Example 1. Private and domestic exemption

In practice, taxpayers assume that they should be exempt from the forex rules if they have used their foreign bank account only for private or domestic use. This example deals with that assumption.

William is an Australian citizen who has recently returned to live in Australia after spending four years working in San Francisco.

On moving home William, decided to keep his Wells Fargo bank account open. He retained a relatively small balance of USD $12,500 in the account. The account was a transactional account. On the day William returned, US$1 bought A$1.33.

Six months later, William's favourite team the Golden State Warriors wins the NBA Championship. William uses his Wells Fargo account to purchase a Warriors Championship cap for US$30. On that day, US$1 bought A$1.42.

At tax time, William is puzzled to hear from his tax agent that, because he has a foreign bank account, he will need to consider the application of Australia's forex rules.

William has assumed that, because he only used the account for private transactions, he should not have any tax issues with it.

Division 775 contains an important exemption for private or domestic transactions — if it can be made to work. Under s 775-15, a taxpayer's assessable income does not include a forex realisation gain ("the realisation gain") to the extent that it is a gain of a private or domestic nature. However, the gain must also be one which is "not covered" by one of the items in the table in s 775-15(2)(b).

The expression "not covered" presumably means that no item in the specified table applies to the realisation gain. Consequently, if any of the items in the table apply to the realisation gain, the gain would be assessable irrespective of whether it is private or domestic.

Essentially, one is asked to examine the table to see whether any of the items apply to the realisation gain. The table is reproduced below.

"Forex realisation gains to which this subsection does not apply			
Item	**You make the forex realisation gain as a result of this event ...**	**happening to ...**	**and the following condition is satisfied ...**
1	forex realisation event 1 or 2	foreign currency or a right, or a part of a right, to receive foreign currency	a gain that would result from the occurrence of a realisation event in relation to the foreign currency, or to the right, or the part of the right, would, apart from this Division, be taken into account under Part 3-1 or 3-3
2	forex realisation event 2	a right, or a part of a right, created or acquired in return for the occurrence of a realisation event in relation to a CGT asset you own, where subparagraph 775-45(1)(b)(iv) applies	a gain or loss that would result from the occurrence of the realisation event in relation to the CGT asset would be taken into account for the purposes of Part 3-1 or 3-3
3	forex realisation event 4	an obligation, or a part of an obligation, you incurred in return for the acquisition of a CGT asset	a gain or loss that would result from the occurrence of a realisation event in relation to the CGT asset would be taken into account for the purposes of Part 3-1 or 3-3"

Item 1 of the table applies if it can be said that a realisation gain arises because forex event 1 or 2 happens to foreign currency and if the realisation gain would be "taken into account" for the purposes of Pt 3-1 or Pt 3-3 ITAA97 ("the CGT provisions").

In plain language, something is "taken into account" if it is considered. The question is whether the "gain" is considered for the purposes of the CGT provisions.

For a guide to the correct interpretation of this strangely worded table, we look to the relevant EM to the Bill[89] which introduced Div 775. The EM explains how private and domestic gains are treated, in the following terms:[90]

> "2.26 First, a gain may not be assessable because it is of a private or domestic nature. In those cases, the forex component of the gain is not assessable income either *[Schedule 4, item 58, subsection 775-15(2)]*. Even so, the income tax system does tax some private or domestic gains. In particular, private gains arising under the CGT provisions that do not qualify for the private use asset exclusions are taxable.
>
> 2.27 Accordingly, the forex component of the following private or domestic gains is taxable under the forex rules if a gain upon a realisation event happening to the CGT asset mentioned *would be taxable* under the CGT provisions ..." (emphasis added)

The Act asks whether the forex gain would be "taken into account" by the CGT provisions, whereas the EM poses a different question, namely, whether the realisation gain *would be taxable* under the CGT provisions. We proceed with the question proposed by the EM: whether the forex component of a private or domestic gain *would be taxable* under the CGT provisions.

Foundationally, it is important to discuss the nature of a bank account. In TD 2006/16, the Commissioner states that:

> "a bank account with a credit balance is a single chose in action representing the account holder's right to be repaid the balance standing to the credit of their account. The net amount standing to the credit of such a bank account from time to time reflects all of the amounts deposited into and withdrawn from the account, including any exempt income deposited. However, the actual funds represented by that amount are beneficially owned by the bank and not the account holder. All the account holder has is a chose in action, being the right to receive the balance standing to the credit of their account, generally payable on demand."

In ATO ID 2003/551, the ATO's analysis is that, because a bank account is "one asset":

> "each deposit adds to the cost base and reduced cost base whilst each withdrawal constitutes a part ending or part satisfaction of the debt asset. Each withdrawal will constitute a CGT Event C2 happening to the relevant part of the asset (the amount withdrawn)."

If that analysis is correct, when William transfers US$30 from his Wells Fargo account, he withdraws money triggering CGT event C2.

William's capital proceeds in Australian dollar terms amount to $42 (US$30 x 1.42) compared with his cost base of $39 (US$30 x 1.33). William has a $3 capital gain.

One must then consider the possibility that William has an exempt capital gain because of the personal use asset exemption in s 118-10(3) ITAA97. Under that section, the capital gain William makes from a personal use asset, or part of the asset, is disregarded if the first element of the asset's cost base is $10,000 or less.

William's bank account (being a chose in action) should be a "personal use asset" if it is used or kept mainly for his personal use or enjoyment.[91]

The Commissioner may well accept that proposition based on the following analysis provided in a recent private ruling:[92]

> "The ordinary meaning of private is 'belonging to or for the use of one particular person or group of people only' and that of domestic, 'relating to the running of the house or to family relations'. It is our view that whether a forex gain or loss from a bank is private or domestic is ultimately determined by the dominant purpose for

which the bank account is held. Other factors may be of assistance (but not determinative) include:

- The character of the right held by the taxpayer;
- The source of the funds used to open the account;
- The nature of the deposits and withdrawals from the account;
- The intention to earn interest from the account."

Because William has used his Wells Fargo bank account primarily for private or domestic purposes, the gain arising on CGT event C2 should be exempt if the first element of the asset's cost base is $10,000 or less.

The "asset" should be the bank account itself, being the single chose in action. The first element of the cost base of the chose in action should be the amount of money William deposited to open the bank account,[93] which is the view that the ATO takes on the matter.[94]

This appears to be good news for William because he recalls making an opening deposit of a few hundred dollars when he first arrived in San Francisco. However, because William became a resident of Australia after he opened his Wells Fargo account, he must apply the market value acquisition rule in s 855-45(2) ITAA97.

The first element of the cost base is the market value of the chose in action on the day William became resident (US$12,500). Consequently, he cannot treat the account as being an exempt personal use asset since the balance in the account on his residency day was more than A$10,000.

Finally, after a truly tortuous journey through Div 775 ITAA97, Div 855 ITAA97 and the CGT provisions, we find that William has a $3 assessable foreign exchange gain.

Example 1 (cont). Limited balance exemption

The need for a limited balance exemption was recognised when Div 775 was introduced. However, the requirement to make a prospective election to take advantage of the exemption creates obvious problems if a taxpayer cannot reasonably be aware of the option to make the election. Many returning Australians would not be.

Continuing the current analysis of example 1 above, William has the possibility of applying the limited balance test.[95] It would permit him to disregard forex gains and losses that arise on his account.

He can make an election if the account is a "qualifying forex account" and if that account and any other qualifying forex account covered by the election would have a combined balance of less than A$250,000.[96]

A "qualifying forex account" is any account which has the primary purpose of facilitating transactions,[97] precisely the purpose of William's Wells Fargo account. However, the election seems only capable of applying prospectively,[98] despite a previous attempt at reform which did not proceed.[99]

In this case, William did not know that he could have made the election.

It is disappointing to see that such issues have still not been addressed in almost 20 years. This is particularly so because, when Div 775 was introduced, the government noted that "compliance costs may be disproportionately high compared with the amount of taxation revenue concerned".[100]

Small bank accounts ought to be automatically exempted. The government should also recognise that the $250,000 limit was introduced 20 years ago.

Until Div 775 is completely rewritten, amendments should be made to significantly increase the limited balance threshold and apply the limited balance exemption automatically, unless the taxpayer elects otherwise.

Example 2. Revenue treatment of forex gains and losses

Another common problem is the inequity of treating foreign exchange gains and losses on revenue account when most returning Australians are not in business. Because of this treatment, mismatches arise, even for taxpayers of modest means.

A returning Australian may make a capital loss on foreign real estate but may also make a forex realisation gain on the repayment of a related bank loan. The forex realisation gain is ordinary income, but the capital loss on the sale of the real estate must be carried forward and quarantined.

Consider the example of Elena who moves to Australia from London.

At the time she returns to Australia, Elena has an apartment in London worth £400,000 (A$720,000) and has a UK bank loan of £200,000 (A$360,000).

A year later, she decides to sell the apartment, but the British pound has deteriorated against the Aussie dollar. Elena sells her London apartment for £400,000 but she receives only A$640,000, making an A$80,000 capital loss in Australia.

However, when she repays the UK bank loan, she makes a forex realisation gain of A$40,000 under forex realisation event 4.

This is clearly inequitable. Elena cannot offset the capital loss she makes on the property against the forex gain on the repayment of the loan.

Had exchange rates moved the other way, Elena could potentially have made a gain on the sale of the property and a deductible forex loss on the repayment of the bank loan.

That result would be overly favourable to Elena since she would receive the benefit of the 50% CGT discount on the capital gain, and the forex loss (not being a capital loss) could then be utilised against the discounted gain.

The foreign superannuation fund puzzle

Many returning Australians come home with retirement savings in overseas funds, and limited superannuation in Australia. Usually, that is not because of any deliberate strategy, but often because their overseas employment

arrangements will come with contributions to in-country retirement schemes.

If a returning Australian is not able to roll their retirement savings into a complying Australian superannuation fund, they are at a comparative disadvantage to fellow Australians. The inequity in this area should be addressed, though calls for reform are not new. The Hugo report noted that:[101]

> "There is a need to investigate in some detail the 'transaction costs' of a return to Australia, including how superannuation and accumulated wealth generated overseas would be treated for taxation purposes in Australia."

In spirit, these vehicles are foreign superannuation funds, but often they do not benefit from that status under Australian tax law.

Instead of benefiting from the concessions in Div 305 ITAA97, they are instead treated as foreign trusts.

The benefit provided under Div 305 for a foreign fund which can be treated as a superannuation fund is clear.

First, the returning Australian has six months to roll over their benefits into a complying Australian superannuation fund without tax consequences.[102] Second, even if the foreign fund remains on foot, it is only the earnings post-residency[103] that will eventually be taxed on withdrawal.

An Australian who is taxed instead under s 99B ITAA36 on a distribution from a foreign retirement trust ends up being taxed on income received by the retirement fund well before they returned to Australia.[104] On most occasions, there would be no tax avoidance purpose that would warrant the application of s 99B.[105]

There is also the risk that amounts which should be exempt under the corpus exception to s 99B[106] might be treated as being taxable if sufficient records are not available. There is also the question of whether *both* employer and employee contributions to such funds would be considered corpus.

A public ruling on these and related issues is badly overdue in order to give taxpayers certainty, at least as far as common arrangements are concerned.

These issues affect large numbers of Australians abroad. The tens of thousands of Australians living in the US would assume that their US retirement plans would be treated as superannuation funds under Australian law, but that is not the case.

Under the *Superannuation Industry (Supervision) Act 1993* (Cth), a superannuation fund is a fund which is indefinitely continuing and which is a provident, benefit, superannuation or retirement fund.[107] That seems like a broad class of funds, but the current interpretation reduces the number of funds that can qualify.

The Commissioner's approach, bound by judicial precedent,[108] is to ascertain whether a scheme provides benefits to members that might not be considered retirement benefits from an Australian perspective – and to use the Australian "sole purpose test" as an interpretative standard.

The Commissioner has ruled privately that many common vehicles used by expatriates abroad for retirement savings are not considered "superannuation funds". For example, the Commissioner does not consider that a US 401(k) plan[109] or a US individual retirement account[110] can be considered superannuation funds. Hong Kong exempt occupational retirement schemes also do not seem to qualify,[111] nor does the Central Provident Fund in Singapore appear to qualify for superannuation fund treatment.[112]

The laborious and complex requirement to analyse the underlying trust deed of a foreign fund to ascertain whether it contains provisions which are wholly consistent with Australian superannuation funds is a significant burden to place on returning Australians.

Even if the returning Australian does have a foreign retirement plan which qualifies as a "superannuation fund", problems arise because of the recent introduction of contribution caps. That makes roll-overs into Australian funds a much more difficult and expensive proposition, if even possible.

Australia's policymakers are well aware that the portability of foreign retirement savings into Australia is desirable. However, the last time the issue was publicly examined was well before contribution caps were introduced.

In 2004, the Senate Inquiry[113] noted that:

> "workers in Australia are inevitably able to contribute to complying funds. If they choose to contribute to a non-complying fund, they may make this choice with a full appreciation of the taxation consequences. An expatriate, in most cases, will *not* have the choice of making contributions to an Australian complying superannuation fund. It therefore seems anomalous to press a tax disadvantage upon them."

Here, one is reminded of the favourable treatment of foreign equity distributions under Div 768 ITAA97.

Australia's policy is to permit Australian companies to remit foreign equity distributions from their offshore subsidiaries back to Australia without any corporate tax.[114] By corollary, why should individuals, particularly returning Australians, not be allowed to easily remit their foreign retirement savings without tax into the Australian superannuation system?

Moving forward

Simplicity and equity in tax policy and administration must be kept top of mind.

This article has shown that when tax laws are modified, very little thought is given to the impact on Australian expatriates. Sometimes their interests appear to be deliberately overlooked.

The new government has an opportunity to grasp the Australian expatriate challenge and differentiate itself from the previous government.

The most urgent matter would be to right the wrong perpetrated on the Australian diaspora by reinstating the main residence exemption. That would restore the reputation of government in expatriate circles and would prevent further casualties of law.

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10 Effective from 1 July 2003.

11 Effective 1 July 2019. Section 23AG ITAA36 was amended to remove the exemption of foreign employment income derived from continuous foreign service of more than 90 days.

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31 Ibid para 1.47.

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36 *Harding v FCT* [2018] FCA 837.

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41 We say "taxpayers" to rebut the contention in some quarters that Australian expatriates do not pay tax in Australia. Many Australian expatriates continue to pay tax, whether because they own property in Australia, pay withholding tax, pay GST when they visit Australia, or have superannuation savings.

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78 Section 768-910(3)(a) ITAA97 only requires a temporary resident to be taxable on foreign employment income if they have provided services while they are temporary resident.

79 Board of Taxation, *Review of Corporate Tax Residency*, 2020.

80 *Bywater Investments Ltd v FCT; Hua Wang Bank Berhad v FCT* [2016] HCA 45.

81 Div III, Pt X ITAA36.

82 S 432 ITAA36.

83 The Tax Institute, submission to the Board of Taxation on the scoping study of small business tax compliance costs, 27 February 2006.

84 M Brough, "Taxation of financial arrangements: easing compliance costs", media release, 5 August 2004. Available at https://ministers.treasury.gov.au/ministers/mal-brough-2004/media-releases/taxation-financial-arrangements-easing-compliance-costs.

85 F Dillon, "Foreign exchange transactions: current issues, tips and traps", (2008) 11(3) *The Tax Specialist* 178 at 188.

86 Forex gains and loss are expected to be disclosed in the category of "other income" or deductions.

87 Division 305 ITAA97 already provides a precedent for such an approach when it comes to foreign superannuation funds.

88 S 775-45 ITAA97.

89 New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1) 2003.

90 Pages 31–32 of the EM to the New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1) 2003.

91 S 108-20(2)(a) ITAA97.

92 PBR 1051251455985.

93 S 110-25(2) ITAA97.

94 In PBR 1051251455985, the Commissioner notes "the original amount deposited into your foreign currency denominated bank account (which was over AUD10,000) is the amount that gives rise to the chose in action (the debt owed by the bank) which is the relevant CGT asset".

95 S 775-245 ITAA97.

96 S 775-245(1) ITAA97.

97 S 995-1(1) ITAA97.

98 The construction of s 775-230 ITAA97 suggests that it applies prospectively, although this is not expressly mentioned in either the section or the EM which introduced the Div 775 and which discusses how elections are to be made at paras 2.305–2.308.

99 F Dillon, "Foreign exchange transactions: current issues, tips and traps", (2008) 11(3) *The Tax Specialist* 178 at 187.

100 Page 29 of the EM to the New Business Tax System (Taxation of Financial Arrangements) Bill (No. 1) 2003.

101 G Hugo, D Rudd and K Harris, *Australia's diaspora: its size, nature and policy implications*, CEDA information paper no. 80, Committee for Economic Development of Australia, 2003, p 14.

102 S 305-65(1) ITAA97.

103 S 305-75(1) ITAA97.

104 A similar problem arises for an immigrant to Australia who may have bona fide retirement saving arrangements in a fund in a foreign country to which s 99B is considered to apply when they eventually receive distributions.

105 Or the often associated deemed interest charge imposed by s 102AAM ITAA36.

106 S 99B(2)(a) ITAA36.

107 S 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

108 *Scott v FCT (No. 2)* (1996) 14 ATD 333; *Mahoney v FCT* (1967) 14 ATD 519.

109 PBR 1051772182925; PBR 1051517688400.

110 PBR 1051504077697.

111 PBR 1051502952600.

112 PBR 1051373410433.

113 Senate Legal and Constitutional References Committee, *They still call Australia home: Inquiry into Australian expatriates*, 2005.

114 S 768-5 ITAA97.

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23-08RES_06/23