TR 2023/1EC - Compendium

Australian Government
Australian Taxation Office

Public advice and guidance compendium – TR 2023/1

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Taxation Ruling TR 2022/D2 *Income tax: residency tests for individuals*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

All legislative references in this Compendium are to the *Income Tax Assessment Act 1936*, unless otherwise indicated.

Issue number	Issue raised	ATO response
1	Many comments in support of the draft Ruling were received. These included: • The information is useful and the examples are good. • The consolidation of the now withdrawn Taxation Rulings TR 98/17 *Income tax: residency status of individuals entering Australia* and IT 2650 *Income tax: residency – permanent place of abode outside Australia*, the modernisation and inclusion of further examples and developments and the moving of materials from the Explanation section in TR 98/17 to the proposed legally binding section is welcomed. • The guidance in the draft Ruling is balanced, making it clear that an individual's intention with regard to residency must be supported by objectively observable connections with Australia, and providing illustrative guidance on these connections, noting that no single factor is decisive. • The clarity provided in paragraph 57 of the draft Ruling on linking the legal rights for physical presence in a foreign country with the intention to reside permanently in the other location for domicile of choice is welcomed.	Noted.

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2	The draft Ruling could go further to provide clear and quantifiable rules, particularly with respect to physical presence in Australia. Without this, it is expected there will still be a need for legislative reform of the residency legislation in the future.	Physical presence in Australia is one factor. The statutory test requires a consideration of all of the facts and circumstances and no single factor is decisive.
3	The definition of 'resident' at paragraph 11 of the draft Ruling should be: '(a) a person …' (the 'a' in front of person is missing).	Paragraph 11 of the final Ruling has been updated.
4	Employers, to determine the correct rate of withholding that should apply to the salary or wages of their employees, need to determine their residency status. A safe harbour should be provided where, if they have made reasonable efforts to determine the residency status of the employee at the time the withholding occurs, then there should be an administrative approach whereby the Commissioner will accept the withholding as it has been made (and not impose or fully remit failure to withhold penalties).	This is outside the scope of the Ruling. We note that Law Administration Practice Statement PS LA 2007/22 *Remission of penalties for failure to withhold* sets out that each case must be considered on its own facts and circumstances – firstly, whether a failure to withhold penalty applies and then, on a case-by-case basis, whether there are grounds for remission.
5	The superannuation residency test should be covered in the final Ruling, in particular, when it does and does not apply for current and former government employees. Specifically, it should consider what occurs if they have moved from the public sector to the private sector.	Given the limited number of funds this applies to, this is not a commonly arising issue and so the scope of the final Ruling has not been extended to cover the superannuation test in detail. However, paragraphs 96 and 97 have been added to the final Ruling to clarify the funds to which it applies, and that the test only applies where the member is an active member.
6	It is noted there is a consistent use in the draft Ruling of terms such as 'long term' or 'short term' or 'considerable time'. Generally, the use of these terms is not accompanied by suggested time periods (other than paragraph 74 of the draft Ruling preserves the previous 2-year 'rule of thumb' in relation to what is considered a substantial period of time). While the subjectiveness of these phrases does not provide absolute certainty that would otherwise be provided by a bright-line test, the draft Ruling and the associated case law provides a significant resource upon which well-advised taxpayers can draw.	The length of time a person has been in Australia or away from Australia is not determinative on its own. Rather, the person's facts and circumstances must be considered as a whole in context and it is only once this is done that it can be determined as to whether they are a resident or a non-resident.

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7	The introductory paragraphs to the ordinary concepts test in paragraphs 17 to 24 of the draft Ruling appear to conflate and unduly narrow the relevant aspects of the test. Paragraphs 17 to 19 are consistent with the concept of ordinary residence being concerned with where an individual resides in the sense of where he or she 'sleeps and lives' (*Duff and Commissioner of Taxation* [2022] AATA 3675), 'eats and sleeps and has his settled or usual abode' (*Koitaki Para Rubber Estates Limited v Federal Commissioner of Taxation* [1941] HCA 13 (*Koitaki Rubber*) or lives and 'keep house and do business' (*Harding v Commissioner of Taxation* [2019] FCAFC 29 (*Harding*)). However, the comments in paragraph 19 of the draft Ruling as to what the test looks to are made without reference to the aspects of the test identified by Wilcox J in *Hafza v Director-General of Social Security* [1985] FCA 201; 6 FCR 444 *(Hafza)* with the result that the draft Ruling confusingly refers to 'factors that commonly inform [the] connection [to Australia]' without providing context for how those factors may be relevant in a particular circumstance. In *Hafza*, Wilcox J recognised that the concept of ordinary residence has 2 elements – *viz* physical presence and intention to treat that place as home. His Honour then observed, at [449] that the test of whether a person remains resident of a place where they are not physically present for a period 'is whether the person has retained a continuity of association with the place [referring to *Levene v Inland Revenue Commissioners* [1928] 1 AC 217 (*Levene*)], together with an intention to return to that place and an attitude that that place remains 'home'' and considered in *Commissioner of Taxation v Addy* [2020] FCAFC 135 (*Addy)* at [74]. The reference to *Levene* is to the concluding passage of Lord Chancellor Viscount's Cave's speech rejecting counting days as the test of where a person was ordinarily resident. The Lord Chancellor stated that ordinary residence connotes 'residence in a place with some degree of continuity and apart from accidental or temporary absences'. It follows that facts and matters that shed light on the following matters may be relevant to the determination of a person's residence: (a) presence in a place	We agree with the comment that 'mere connection' is not sufficient and have redrafted paragraph 20 of the final Ruling so that it reflects that the factors are informing the nature of the connection to Australia. We also agree that there is a need to explicitly reference the 'continuity of association' concept and have added new paragraph 25 to the final Ruling. Regarding the comments on paragraph 24 of the draft Ruling, the proposition being put in that paragraph is that because the statutory question is whether a person resides in Australia, a person can still meet that statutory definition regardless of where else in the world the person may reside or have stronger connections. We consider that the principle that having a connection to or being a resident of another country does not necessarily diminish connection to Australia is supported by the referenced passage by Logan J in *Pike v Commissioner of Taxation* [2019] FCA 2185 (*Pike*). His Honour made that particular observation in the context of considering dual residents and that there is no 'necessary antipathy' between finding a person resides in Australia and also, at the same time, resides in another country. However, we agree that this does not render a person's connections overseas irrelevant to the factual inquiry. To make this clearer we have removed the words 'the factors focus on your connection to Australia' from the first sentence of paragraph 24 in the final Ruling.

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	(b) continuity of association with a place, and (c) intention as to staying in or returning to a place that is 'home'. The second sentence of paragraph 20 of the draft Ruling states that the test looks to a person's 'connection' to Australia and proceeds to list 'factors' said to 'inform that connection'. There are 2 principal problems with that paragraph. Firstly, the draft Ruling's focus on facts and matters directed to a person's 'connection' with Australia unduly narrows the statutory inquiry which is informed not only by presence and 'continuity of association' with Australia (or a particular place within Australia) but also by the person's presence and association with a place outside of Australia and that person's intention. The proposition underlying paragraph 20 of the draft Ruling is made explicit at paragraph 24 of the draft Ruling where it states that a person's connection with or residency 'of another country does not necessarily diminish any connection to Australia'. The reference cited in support of that proposition is the following passage from the reasons of Logan J in *Pike v FCT* [2019] FCA 2185 at [57], where the learned primary judge stated: > The point is that it is no part of the ordinary meaning of reside in the 1936 Act that there be a "principal" or even "usual" place of residence. It is important that, as used in the definition in s 6(1) of the 1936 Act, "resident" not be construed and applied as if there were such adjectival qualifications. On the facts of a given case, the local dual residence examples given may find analogues in a conclusion that a person is a resident of more than one country, according to the ordinary meaning of the word "resident". That passage provides neither express nor inferential support for the proposition stated in paragraph 24 of the draft Ruling, which informs paragraph 20 of the draft Ruling. The proposition should be deleted from paragraph 24 of the draft Ruling and paragraph 20 of the draft Ruling should be redrawn consistent with principle.	

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	Secondly, for the reasons outlined above, mere 'connection' of any nature with a place does not inform the application of the test. In particular, the incorporation of the concept of 'continuity of association' into the test of ordinary residence does not invite an inquiry into any mere 'connection' a person retains or creates with a place. It must be a 'connection' that informs whether the person has retained a continuity of association in the relevant sense. While the content of paragraph 20 of the draft Ruling is no doubt intended to be informed by the commentary that follows in paragraphs 25 to 52 of the draft Ruling, in light of the above, it is suggested that paragraph 20 of the draft Ruling is recast to reflect the law as stated above. In particular, it is suggested that it be recast to clarify that the factors enumerated in paragraph 20 of the draft Ruling are factors that inform the test articulated by Wilcox J in *Hafza* which has been accepted as good law in subsequent appellate decisions. Another reason for suggesting that paragraph 20 of the draft Ruling be recast is that it will clarify the comments at paragraph 29 of the draft Ruling. The draft Ruling, in the context of outlining the Commissioner's views on the relevance of the period of physical presence in a place, states in the second sentence that where a person who has previously spent a long time in Australia spends a shorter time in the relevant income year, that 'shorter period … assumes less relevance if the person has retained a continuity of association with Australia …'. Nowhere in the draft Ruling does the Commissioner clarify what is meant by that reference to 'continuity of association'. As already outlined, paragraph 20 of the draft Ruling fails to distinguish 'continuity of association' from mere connection and the concept is nowhere else explained. Footnote 18 of the draft Ruling refers to the reasons of Derrington J in *Addy* at [76]. [76(d)] refers to the concept of 'continuity of association' without explaining it, and identifies 'relevant circumstances' that to a reader not immersed in tax law are not easily reconciled to paragraph 20 of the draft Ruling. These issues should be addressed in the final Ruling.	

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8	The concept of residency as it applies for migration and social security purposes is different to residency for taxation purposes. Therefore, the position in paragraph 34 of the draft Ruling that statements or declarations made as to whether a person is a resident for the purposes of the entry into or exiting from the country can be applied for taxation purposes is not appropriate. This is because they are not directed where a person is a resident for tax law purposes.	We agree, as acknowledged in footnote 27 of the final Ruling that the concept of residency as it applies for migration and social security purposes is different to residency for taxation purposes. However, statements in declarations made in relation to obtaining visas and incoming and outgoing passenger cards can still be relevant for determining residency for taxation purposes. This is because they provide contemporaneous evidence of the taxpayer's intentions of where they intended to reside at the time they were completed. This was confirmed by Derrington J in *Addy* at [81–82].
9	Paragraph 35 of the draft Ruling appears to conflate 2 separate issues: • the 'significance' to be attributed in the circumstances to a person's intention as part of the test, and • the 'weight' to be afforded to 'evidence' of a person's intention. A person's intention will always be of 'significance', as will the person's physical presence. Neither is dispositive. The concern is that paragraph 35 of the draft Ruling obscures the important point that the 'weight' to be afforded to 'evidence' of a person's stated intention 'depends on the circumstances': those circumstances include both the context in which the statement is made and its contemporaneity or otherwise as to a person's intention at a particular point in time. Those circumstances and the effect they may have on weight were discussed by the primary judge in *Harding* at [42–45 in a passage that Davies and Steward JJ (Logan J agreeing at [2]) described as 'plainly correct' (*Harding* at [61]). It is suggested that paragraph 35 of the draft Ruling be redrafted to separate the issues of the 'significance' attributed to intention *vis-à-vis* physical presence on the one hand, and the weight to be afforded evidence of intention on the other hand.	We agree. The final Ruling has been updated as follows: • paragraph 35 for the weight given to subjective intention, and • paragraphs 36 to 37 for the weight given to objective circumstances.
10	Paragraph 66 of the draft Ruling takes a narrow view on the permanent place of abode as it does not describe the timeframes or circumstances of the scenario. As a result, it potentially does not contemplate situations where an Australian-domiciled individual's employment requires them to travel from one project site to another project site as part of their ongoing	The wording in paragraphs 68 and 69 of the final Ruling has been clarified and the situations of moving between countries and moving within a single country have been separated. Consideration is required of a person's facts and circumstances to determine, if they relocate to a place

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	employment. For these situations, the ATO view seems to suggest that these individuals would never become non-residents even if the arrangement takes place over a substantial period of time. Additionally, this paragraph states that an individual will not have a permanent place of abode if that individual moves from place to place. This is inconsistent with the decision in *Harding* and paragraph 64 of the draft Ruling which states that a permanent place of abode refers to '...physical surroundings in which you live, extending to a town or country'. It is suggested that further clarity and guidance is needed to paragraph 66 of the draft Ruling to contemplate long-term and ongoing employment arrangements in multiple jurisdictions to ensure the determination of 'permanent place of abode' is consistent with the outcome in the *Harding* case.	overseas, whether they have established their permanent place of abode at a place or places.
11	In regards to permanent place of abode, it is noted that some taxpayers do not have a home in Australia but instead maintain homes in several foreign countries and they spend considerable time in each of these foreign country homes throughout an income year. These taxpayers may not have an employment relationship requiring ongoing presence in only one country and the nature of their business or investments is that they do not need to live in only one country. However, they do have enduring connections to each home in the foreign countries. It is suggested, from experience, that these taxpayers live overseas permanently and only visit Australia infrequently (if at all) and for very short periods (being days, not weeks) using hotel accommodation. Paragraph 66 of the draft Ruling notes there are no 'hard and fast rules' to determining whether an individual has a permanent place of abode outside Australia. The Ruling should provide clearer guidelines to taxpayers to provide certainty of outcome and simplicity of self-assessment. We recommend that an objective and quantifiable rule is added to this paragraph. As a starting base, it is recommended adding a statement that an individual will not be a resident of Australia if they: • spend less than [3 months] in Australia each year for an extended period (for example, 3 years or more)	Determining whether a person's permanent place of abode is overseas requires consideration of the person's facts and circumstances. Statements or rules in addition to that of the statutory test are outside the scope of this Ruling.

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	• do not have any property in Australia that is consistently available for their use • have one (or more) properties outside Australia that are owned, maintained, and used as a permanent place of abode on an enduring basis (for example, at least 3 months in an income year).	
12	Paragraph 71 of the draft Ruling suggests that if an individual departs from Australia with an intention to return to Australia after a finite period, they would not be establishing a permanent place of abode overseas. This is at odds with paragraph 73 of the draft Ruling and the 2-year rule of thumb referenced at paragraph 74 of the draft Ruling. It is not uncommon for individuals (and their families, if applicable) to leave Australia to take up employment for 2 to 3 years and establish a mode of life in the other country consistent with being a non-resident of Australia but have some intention to potentially return to Australia in the longer term. Indeed, this is the scenario most frequently observed in a global mobility (employer-directed) context. As currently drafted, paragraph 71 of the draft Ruling seems to make an individual's intention to return to Australia the decisive factor in determining residence which is inconsistent with the general principles and guidelines in the draft Ruling. It is suggested paragraph 71 of the draft Ruling be deleted or reworded to provide a more balanced approach to the 'objectively observable' actions supporting an individuals' intention and considering the duration and nature of overseas ties.	As set out by the Full Federal Court in *Harding*, this part of the residency definition requires a consideration of whether the person has abandoned their residency in Australia and commenced living overseas in a permanent way. We consider that it is consistent with this, and the objective purpose of the test, to state, as a general proposition, that a temporary, fixed departure will not result in the person having their permanent place of abode overseas. The 'rule of thumb' set out in what is now paragraph 77 of the final Ruling (which was retained from Taxation Ruling IT 2650 (now withdrawn)) is that if the departure is for less than 2 years, it is unlikely this would result in the person having their permanent place of abode overseas. Stays of 2 years or more need to be considered in the context of all the relevant facts and circumstances.
13	The reference to special celebration such as Christmas in paragraph 73 of the draft Ruling provides a narrow view on acceptable return travel and limits how many trips can be spent in Australia. It is suggested the ATO instead makes reference to periods of leave or holidays. It should also not preclude limited return travel for work relating to the foreign employment.	Paragraph 76 of the final Ruling has been updated to refer to cultural events, celebrations and annual leave. This distinguishes the situation from when a person takes regular trips when overseas and when work permits (see, for example, the facts in *Pike*). The wording does not preclude limited return travel for foreign employment. However, the situation of a person who remains domiciled in Australia and who returns to work in Australia is a more nuanced situation and all the relevant facts and circumstances must be considered. We have not, therefore, added such a situation to the list of situations

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		which would typically not result in Australian residency being resumed. Such cases require further consideration, taking all of the facts and circumstances of the person into account.
14	In regards to paragraph 76 of the draft Ruling concerning the nature of accommodation, it is common for an individual who is relocating to another country with an intention to reside there permanently to use hotel or Airbnb-style accommodation for a short period of time before they get settled and find more suitable longer-term premises. The draft Ruling suggests hotel accommodation is not indicative of a permanent relocation, that is:. ... temporary accommodation such as hotels, camp sites, barracks, dongas or accommodation arranged or owned by the employer on a non-exclusive basis may indicate the presence overseas is not permanent. It is suggested the draft Ruling make it clear that this is indicative only and there may be instances where the accommodation is temporary only as a precursor to the individual finding more suitable long-term accommodation. It should also reference the High Court decision in *Koitaki Rubber* at [249] where Williams J said: The place of residence of an individual is determined, not by the situation of some business or property which he is carrying on or owns, but by reference to where he eats and sleeps and has his settled or usual abode. If he maintains a home or homes he resides in the locality or localities where it or they are situated, but he may also reside where he habitually lives even if this is in hotels or on a yacht or some other place of abode.	We maintain that staying in temporary accommodation for the duration of their stay overseas, would generally not give rise to someone establishing their permanent place of abode overseas. See further the facts in footnote 48 of the final Ruling which refers to *Sanderson and Commissioner and Taxation* [2021] AATA 4305. Further, the new footnote 50 of the final Ruling states that a stay in short term accommodation as a precursor to finding long term or permanent accommodation should be considered in conjunction with other factors in deciding a person's residency. Example 9 of the final Ruling provides an example of such a situation..
15	Paragraph 77 of the draft Ruling does not provide clarity for taxpayers in a number of common scenarios. In particular, situations where taxpayers: • retain their home for the purpose of adult children who remain in the home. The taxpayer may stay in that home for short periods such as a visit to Australia (consistent with those mentioned in paragraph 73 of the draft Ruling), or • have left their home vacant but return to the home for short periods (such as those trips mentioned in paragraph 73 of the draft Ruling).	As outlined in paragraph 80 of the final Ruling (consistent with paragraph 77 of the draft Ruling), in situations such as those advanced, the significance of the status of the home can vary depending on the context. Every person's context is different. We do not consider that we can be more definitive in this regard as doing so may risk elevating (or not as the case may be) the status of the home inappropriately. We have, however, provided further examples as we consider that examples are the best way to illustrate how the status of the home may feature in a residency decision (noting that the

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	The draft Ruling also does not contemplate situations where there are 2 permanent homes in separate locations. An understanding of the Commissioner's view on the accommodation arrangements outlined in situations such as those outlined and how the nature of such arrangements would determine an individual's permanent place of abode under the domicile test would be welcome. It would also be useful to have further guidance on how the outcome in *Re Mayhew and Federal Commissioner of Taxation* [2013] AATA 130 (*Mayhew*) is being applied in this draft Ruling.	referenced decision of *Mayhew* is, as are all residency decisions, an outcome based on its facts).
16	The commentary provided in paragraphs 97 to 98 of the draft Ruling around individuals on working holiday maker visas is inconsistent with the conclusions reached in *Addy*, specifically around the application of the 183-day test. Furthermore, these paragraphs ask to consider holistic facts and circumstances in determining residency but conclude that working holiday makers will rarely be resident by virtue of their visa type. Furthermore, the draft Ruling does not contemplate situations where a working holiday maker visa is obtained by an individual as a temporary measure with a view to obtaining a longer-term visa. Additional commentary from the Commissioner as to why the 183-day test does not apply to individuals on working holiday maker visas and why this differs from the conclusions reached in the *Addy* case would bewelcome. For situations where a working holiday maker visa is initially obtained so that an individual can relocate to Australia and subsequently obtains a longer-term visa, and provided this can be supported by other relevant facts and circumstances, our view is that the intention to reside in Australia on a longer-term basis should conclude that the individual would be considered a resident from when they first arrive in Australia, including the period the individual is on the working holiday maker visa.	The Full Federal Court in *Addy* found that the taxpayer was a resident under the 183-day test on the basis that the Commissioner had not reached the requisite state of satisfaction. The Full Federal Court did not, because it could not, consider what the Commissioner's state of satisfaction ought to have been. There is no inconsistency between the views in the either the draft or final Ruling and the views of the Full Federal Court on the operation of the 183-day test. The view expressed in the final Ruling is not that visa type is dispositive of the outcome. The visa in the situation of a working holiday maker is relevant in so far as it sets out the terms and conditions on which the person enters and stays in Australia. Those terms and conditions include that the requisite intention must be that of having a holiday in Australia. We agree, however, that where the person who enters on a working holiday maker visa changes that intention and this is supported by a change in behaviour, they may be a resident. Paragraph 104 has been added to the final Ruling to clarify this.

17	Several comments were received noting concerns with self-assessment of individual residency and potential administrative shortfall penalties, including: (a) Concerns that expressing the Commissioner's views in a Ruling on whether: • a person's permanent place of abode is outside Australia under the domicile test, and • a person's usual place of abode is outside Australia and that the individual does not intend to take up residency in Australia, will not be sufficient to show the Commissioner's state of satisfaction on the provisos for the domicile and 183-day test because the legislation requires the Commissioner to be satisfied about that *particular* person's place of abode and intention to take up residency. Thus, it would be impossible to technically meet the domicile or 183-day test unless there is a more definitive statement from the Commissioner regarding an individual's tax residency based on particular facts and circumstances. A guidance product that operates similar to a class ruling could be a practical way to enable an individual to self-assess the Commissioner's satisfaction about one's permanent place of abode or usual place of abode. (b) The ATO should adopt an administrative approach, particularly in regard to the imposition of penalties, that provides greater certainty and increases fairness in the operation of the tests. (c) While paragraphs 103 to 104 of the draft Ruling invites individuals to self-assess whether the Commissioner would form the necessary state of satisfaction and that taxpayers should 'take a reasonable view', footnote 57 of the draft Ruling refers to penalties for adopting unarguable positions under section 284–15 of Schedule 1 to the *Taxation Administration Act 1953*. The draft Ruling is couched in terms that give taxpayers no comfort that a fair reading of the draft Ruling and attempt to apply to their facts will lead them to the same conclusion as the Commissioner, or that a Court would conclude that it is as likely as not that the discretion could be exercised in the way contemplated by the taxpayer. This is highlighted by the emphasis in the introductory section to the draft Ruling in paragraphs 7 and 8 and	(a) As correctly identified, the provisos require that the Commissioner reach a state of satisfaction for a particular individual to determine their residency. To form a state of satisfaction relevant to an individual's residency status, the Commissioner is required to consider all relevant facts and circumstances of that individual and then to form a view on those. This cannot be done through a public ruling such as a taxation ruling or a class ruling. Further, in a self-assessment system this is not possible, and the taxpayer is entitled to assume that a discretion will be exercised in a particular way provided that it is reasonably arguable that it would be lawful for the Commissioner to exercise it in that way. If it is exercisable only in one way, taxpayers should assume that it will be exercised in that way. The final Ruling gives guidance on how the Commissioner would approach this task to assist with self-assessment. (b) See comments at Issues 2, 11 and 15 of this Compendium. Residency is a facts and circumstances test. (c) The final Ruling comprehensively sets out the relevant principles to apply and provides fuller explanation through text and examples of their application to particular fact patterns. The examples illustrate particular aspects set out in the Ruling. Because no single factor is dispositive and because the weight of factors will depend on context and individual circumstances, it is not possible to replace the holistic consideration required by the residency tests with an illustrative example. Taxpayers or their advisors, applying the final Ruling, provided they take all relevant facts and circumstances into account, should be able to determine their residency status with a high degree of confidence. Particularly complex situations may be more suited to a private ruling. We would expect that the situations where taxpayers have a

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	also in paragraphs 21 to 35 that 'an outcome in one case does not govern the outcome in a different case, even where the facts are similar [and] …[h]aving similar facts to those in an example [in the draft Ruling] will not always result in the same outcome'. This exposes taxpayers to an invidious choice between equally unattractive options of lodging based on their view and, if the Commissioner disagrees, being exposed to penalty or lodging as a resident (or non-resident) and objecting to their assessment. Expecting all individuals to seek rulings is not practical. One potential solution is for the ATO to accept that a taxpayer whose circumstances can reasonably be said to fall within the scope of an example in the draft Ruling has a 'reasonably arguable' position. Another potential solution is for a tool to be made available to taxpayers to make a straightforward assessment of their residency so that any statement in a return or objection lodged consistent with the accurate completion of such an assessment will be treated as being reasonably arguable such that the taxpayer is protected from penalties. This could be achieved by adapting the ATO's 'online tool' for this purpose..	need for private rulings to determine their residency status would be in the minority of cases. If we review a taxpayer's residency status, any efforts the taxpayer or their advisors have taken in determining their residency status in accordance with the final Ruling, will be viewed favourably, both in terms of determining their residency status and, if relevant, considerations on shortfall penalty.
18	Examples in the draft Ruling should more clearly identify whether the persons are inbound or outbound. Further, as inbound people also have the temporary residency provisions to fall back on, should they be a resident, the Ruling is of greater importance to outbound people. Therefore, there should be greater focus on outbound people.	The principles that apply to determining residency for an individual apply equally to both inbound and outbound taxpayers. We do not consider that it would be useful to distinguish between the examples on this basis.
19	Examples covering the following common situations would be of benefit: (a) where a person working for an overseas employer comes to Australia to work on secondment at an Australian-based affiliate of their overseas employer (b) the impact on a person's residency where they accept a job to work overseas for an extended period of time, but their family is not able to immediately relocate with them whilst they wrap up things in Australia. The family then relocates to the overseas location once this	The final Ruling contains additional examples relating to the matters in (a) to (d). The situations in (e) and (f) are complex, requiring consideration of situations with extensive facts and circumstances where a small change to the situation can have a material impact. Due to their complexity, an example is not suitable for inclusion in a Ruling of this nature. We consider that examples on situation (g) would be misleading without a consideration of the relevant double-tax

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	has occurred. This could include waiting for the children to finish the school year or for a spouse to finish up a work contract (c) the impact on a person's residency where they are located overseas, then accept a job to work in Australia, but their family is not able to immediately relocate with them whilst they wrap up things in the overseas location (d) confirming that a person is a non-resident where they depart Australia, ceasing all connections with Australia other than retaining a property here that is rented out, retaining a bank account to permit transactions to be conducted as required and retaining superannuation investments (which, as an Australian citizen they are unable to have paid out prior to preservation age) (e) where a person previously residing exclusively in Australia relocates to Hong Kong (or another overseas location) working as a director for a multinational enterprise. As part of their duty they have responsibility for operations in the Asia-Pacific region. This requires them to travel, spending time at each of the regional locations. This includes Australia, where they spend one week per month, residing in a residence they own. They have children attending boarding school and extended family also located in Australia (f) individuals displaced by war, in COVID quarantine, receiving medical treatment or other circumstances beyond their control (g) the situation of aircrew and ship crew visiting Australia in undertaking their duties, and (h) the situation where a person coming to Australia is found to be a resident under the 183-day test but is not considered to be a resident under the ordinary concepts test (other than the peculiar circumstances of Ms Addy in the *Addy* case), noting that such an example would be highly unusual.	agreement (DTA) which contain specific Articles addressing employment income of ship crew and is beyond the scope of this Ruling. We agree situation (h) will be rare and have not included such an example.
20	In terms of persons in the examples moving or relocating to Australia, they contain an underlying assumption that the person has never been an Australian resident or had an Australian domicile. However, they do not state this. This should be clarified and state whether, if the person had	To the extent there is an impact, such as when the example is applying the domicile test, then this will be apparent from the underlying facts of the case. Therefore, a separate disclosure in all examples is not considered necessary.

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	previously been an Australian resident, or had an Australian domicile, the conclusion in the examples would change.	
21	The draft Ruling does not acknowledge that wealthier persons may not need to dispose of Australian assets before leaving for overseas, while a less wealthy person may have to dispose of them. For instance, why would a wealthy person need to dispose of a share portfolio or investment properties that are good investments. Holding such properties may be justified for a resident or a non-resident.	The amount, nature and type of investments that people hold in Australia is a relevant fact and circumstance for determining their residency status and this is made clear in paragraph 52 of the final Ruling.
22	Example 4 of the draft Ruling refers to a 'definite change or break' from Mexico. While the Example concludes that Conchita does not become an Australian resident, the phrase 'definite change or break' has more relevance to ceasing residency than gaining residency. See, for example, *Glyn v Revenue & Customs* [2013] UKFTT 645 (TC).	We consider that it is relevant to compare the behaviour in and out of Australia regardless of whether the person is entering or leaving Australia.
23	Example 5 of the draft Ruling relates to the ordinary concepts and domicile tests. In relation to the ordinary concepts test, provided it was Mark's initial intention to live and work in Brazil for the duration of the 2-year temporary assignment, he should not be considered a resident under the ordinary concepts test. His wife and children's return to Australia would mean they should be considered residents from the date of their return, but Mark's residency status should be considered separately to theirs. While having his immediate family return to Australia would suggest an enduring connection to Australia, Mark's intention was to move overseas for a substantial period, and his limited physical presence in Australia during this time (only an annual holiday and visits for milestone events) would also suggest that he is not a resident of Australia for the period in question under the ordinary concepts test. The continuance of superannuation in Australia as referenced in the Example would typically be the employer's decision and therefore outside of Mark's control. As such, it would not be a significant factor in this case. In relation to the domicile test, while Mark has a domicile in Australia, it appears that he has a permanent place of abode outside Australia. If this is not the case, this point should be elaborated upon. It is not accepted that	We agree that Mark's residency status is separate to that of his family. In our view, the pattern of behaviour displays a continuity of association with Australia consistent with residing here. We would consider Mark to remain a resident under the domicile test and have added further commentary to explain our conclusion.

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	Mark's spouse establishing a permanent place of abode in Australia automatically results in him also establishing the same permanent place of abode when the facts indicate otherwise. Mark has a documented intention to be in Brazil for a period of 2 years and is physically present in Brazil for most of this time. A serviced apartment is not necessarily a temporary or transitory form of accommodation. There are also different cultural norms globally with respect to permanent housing such as serviced apartments and furnished accommodation. While not often seen as permanent in Australia, these are more commonly used as long-term accommodation in other countries. Given Mark's accommodation is provided by his employer, the type of accommodation he has in Brazil would likely also be the employer's decision and therefore outside of Mark's control.	
24	Where examples discuss persons in relationships, would the conclusions change if the people in the examples were living apart, but the relationship was not in 'difficulties'? For example, in Example 5 of the draft Ruling if the wife returned to Australia because of difficulties in the marriage, and in Example 6 of the draft Ruling if the wife staying in Australia was not due to marriage difficulties.	It is not possible in a Ruling to set out all the various permutations of facts. Each case must be decided holistically, taking into account all of the facts and circumstances of that particular case. The examples in the final Ruling are included to illustrate how the concepts underlying the residency test are applied in practice.
25	In regard to Example 6 of the draft Ruling it is our view that Matthew should be a non-resident under the ordinary concepts and domicile test from January when he first departs, being the onset of his temporary work assignment for a period of 2 years. As noted in paragraph 74 of the draft Ruling, 2 years is a substantial period and sufficient to abandon Australian residency. The maintenance of a car and a property in which his soon to be ex-wife was living in should not be considered an enduring connection to Australia. With respect to the domicile test, there is no suggestion that he does not have a permanent place of abode in Brazil from January. A temporary work assignment of a significant length (2 years or more) should be seen as of equal or near-equal weight to a permanent contract.	On these facts we do not consider that there is a sufficient severing of ties from the outset to commence non-residency from the date of departure. Regarding the 2-year 'rule of thumb', see comments at Issue 14 of this Compendium.

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26	In Example 8 of the draft Ruling, reference is made to 'remnants of prior residence'. It is not clear what connections Brian maintained which were the remnants. The draft Ruling states the conclusion without setting out the facts.	Example 10 of the final Ruling has been clarified.
27	In respect of Example 9 of the draft Ruling, it considers Stuart to be a resident because 'he has not established his permanent place of abode outside of Australia, as evidenced by his shifting between a number of countries and apartments for employment purposes'. There are insufficient facts to explain why Stuart has not established a permanent place of abode outside of Australia other than his moving between countries and apartments. The Ruling should be specific about the nature of the connection to China and the 'various countries', including the specific town or country. It should also have regard to the factors in paragraph 67 of the draft Ruling including the length of stay in each place, the nature of the accommodation (although see paragraph 64 of the draft Ruling and *Harding)* and the durability of association.	The facts regarding timeframes and the nature of the connection in Example 11 of the final Ruling have been clarified. As noted at Issue 24 of this Compendium, it is not possible in a Ruling to set out every single fact that may feature in a residency case. Consistent with paragraph 8 of the final Ruling, the Example illustrates a point or principle rather than provide the exhaustive analysis one might expect in, for example, a private ruling.
28	Paragraph 139 of Example 10 in the draft Ruling is inconsistent with the conclusion in paragraph 65 of the draft Ruling, that a comparison must be made to determine which place of abode is the permanent place of abode where an individual has a place of abode in both Australia and overseas. The suggestion in this Example that an Australian residence must be abandoned in order to establish a permanent place of abode outside Australia is not agreed with. The guidelines provided in paragraph 65 of the draft Ruling in determining which place of abode is an individual's permanent place of abode should be adopted in this Example.	The proviso of the domicile test requires an abandonment of residency and establishing the person is living overseas in a permanent way. Because of the nature of the test it is perhaps not apt to speak of a 'comparison' as such. Where a person has 2 'places of abode', one of which is in Australia, the assessment that needs to be made is which one meets the description of that person's 'permanent place of abode'. The principle established in paragraph 67 of the final Ruling is that a person cannot have 2 permanent places of abode. Example 12 of the final Ruling illustrates this principle. It cannot be said of a taxpayer that remains living in Australia for 6 months of the year that they have abandoned residency in Australia. This is regardless of the permanency or otherwise of their 'place of abode' overseas. This is consistent with Davies and Steward JJ in *Harding* where their Honours stated at [38]:

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		It follows that there is no incongruity in a person physically living permanently in another country whilst retaining at all times an Australian domicile. For that purpose and critically, what has to be abandoned for the purpose of subpara (i) of the definition, is not "Australia" but "residence" in Australia.
29	When in Example 10 of the draft Ruling reference to 'regular order of his life' is made, what if Corey's only work was in Spain? The Example seems to assume Corey is retired or just an investor.	Corey's employment status or otherwise is not decisive in deciding the outcome of Example 10 of the final Ruling. The principle being illustrated is that a person who continues to live for substantial, regular periods each year in Australia cannot be said to have their permanent place of abode overseas.
30	The commentary provided for Example 14 of the draft Ruling is not agreed with. The commentary in paragraphs 97 to 98 of the draft Ruling asks to consider holistic facts and circumstances and the fact pattern in this Example would suggest that Ryan's behaviour is consistent with residing in Australia (that is, personal belongings packed into long-term storage in Ireland, initial intention to be in Australia for 12 months and subsequently extended via an additional working holiday maker visa, resigning from his job in Ireland and obtaining a 12-month lease for accommodation in Australia). Furthermore, his second year in Australia suggests that his usual place of abode is in Australia as he has leased accommodation and bought furniture to live in it.	See our response to Issue 16 of this Compendium. Further, in relation to what is now Example 18 of the final Ruling, Ryan is having a holiday in Australia and works to support that holiday. He does not intend to reside in Australia permanently. He has not done anything further to establish a more permanent connection to Australia.
31	The draft Ruling refers to reasons of a number of decisions that were reversed on appeal (examples mentioned in Issue 32 of this Compendium). The parts of the reasons referred to in the draft Ruling were not reversed on appeal. Nonetheless, '[if] a decision of a court is reversed on appeal, the reasoning which led to the court's conclusion ceases to be binding both as to points on which the court was reversed but also points on which the appeal was not taken'[1] The Commissioner should administer the law as it is declared by the courts. Generally speaking, that includes administering the law as declared by a	While we agree in principle that a Ruling should refer to the highest precedential authority available, we do not agree that this means we cannot, or should not, refer to a decision reversed on different grounds or where the lower court's decision was upheld and provides a fuller or clearer explanation of the law. The Full Federal Court's decision in the *Addy* appeal is the final decision on residency. The High Court appeal was concerned with the application of the non-discrimination

[1] Herzfeld, P and Prince, T (2020) *Interpretation*, 2nd edn, Lawbook Co., Australia, p. 718 referring to *Commissioner of Taxation (Cth) v St Helens Farm (ACT) Pty Ltd* [1981] HCA 4; 146 CLR 336 at [410] per Aickin J; *Cemex Australia Pty Ltd v Takeovers Panel* [2009] FCAFC 78 at [95] per Ryan, Jacobson and Foster JJ.

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	superior Court where that decision is subject to an appeal that is not concerned with or does not disturb the relevant aspect of the decision from which the appeal was made. Such a decision may still be persuasive. Nonetheless, in issuing public rulings, it is considered that it would aid clarity and certainty for the Commissioner to express principles of law primarily by reference to authorities that are binding precedents where possible. For example, rather than referring to the reasons of Derrington J in *Addy* ((referred to in the draft Ruling as 'Addy appeal') at [83] (reversed on appeal to the High Court: [2021] HCA 34) as authority for the proposition in the second sentence of paragraph 25 of the draft Ruling explaining the distinction between staying and residing in Australia, reference could be made to *Hafza* and the binding authorities endorsing that decision. It is also suggested that in footnote 7 of the draft Ruling that the reversal of the decision in the 'Addy appeal' by the High Court be noted. Examples of references to non-binding authorities in the draft Ruling are: • *Addy appeal* – footnote 14, footnote 16 , footnote 18 and footnote 23. • *Harding* (reversed on appeal) – footnote 10.	article of the relevant DTA only. In doing so, the decision on residency of the Full Federal Court was accepted, both by the parties to the case as it was not appealed, and by the High Court in it deciding the non-discrimination article applied in that case, which could only occur if indeed Ms Addy was a resident. In *Harding*, Derrington J's decision on ordinary residence at first instance was also upheld by the Full Federal Court on appeal.
32	The Ruling would be of enhanced usefulness to taxpayers if it were to also include an analysis of how a DTA agreement could impact an individual's Australian income tax position. It is acknowledged that where an individual is treated as a resident of the other jurisdiction for the purposes of the DTA agreement, this does not cause the taxpayer to be a non-resident of Australia for assessment purposes. However, it would be of great assistance to taxpayers if the ATO could explain how it would apply the 'tie-breaker' clauses of the DTA, in particular, the 'habitual abode' test, in coming to a view on the sole residence for the purposes of the agreement. Disputes concerning residency often occur where there are factors that point both towards and against a conclusion that a person is resident in Australia. A significant number of residency disputes are ultimately determined by the tie-breaker provisions in a DTA. It is recommended that public guidance be issued as a matter of priority dealing with the application of both the tie-breaker provisions and the scope of any inconsistencies	Considering the tie-breaker tests in detail and the implications of them would considerably add to the complexity and length of this Ruling and is considered outside the scope of this Ruling.

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	between DTA and domestic law residency concepts that may be relevant to the application of those provisions.	
33	The draft Ruling should be expanded to cover off on all relevant taxation obligations of inbound and outbound workers including superannuation guarantee.	This is outside the scope of this Ruling.
34	Determining a taxpayer's residency can be a difficult topic for tax practitioners to advise their clients on. This determination may require the analysis of factors and circumstances that may not be apparent in a client environment. It is considered that the provisions of tools and fact sheets to tax practitioners will assist during this enquiry. Examples of tips and fact sheets include: • a checklist of information and evidence that tax practitioners should review to assist in the making of the determination • webinars and other training outlining the ATO's approach to determining the residency of a taxpayer, with case studies based on real examples and case law, and • increasing awareness of emerging issues or trends resulting in the incorrect determination of a taxpayer's residency.	Noted.