Are Australian Taxation laws deterring Australians from living and working overseas: A critical review of the proposed law to remove the main residence exemption for non-residents?

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Abstract:

The Australian government is in the process of introducing new laws to remove the main residence exemption from income tax on the capital gain for non-resident home owners. This has been initiated on the basis that it will make housing more affordable for resident Australians. The Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures (No.2)) Bill 2018 has serious implications for Australians wanting to work and live in an overseas country and change their residency status from that of Australia. In some cases, Australians need to live and work overseas for employment opportunities or for their career enhancement or even to maintain their employment if transferred by their employer. The consequences of changing residence mean that the family home, the main residence will be subject to income tax on the capital gain if sold while the owner lives overseas as a non-resident of Australia for taxation purposes. Home owners faced with paying income tax on the family home may be deterred from working and living overseas. This paper will critically review the consequences that flow from this proposed law and what this means for Australians wanting to work in another country. The paper will also make recommendations on how the proposed law may be amended so that Australian residents who own their own family home may avoid paying income tax on a capital gain that is exempt for every other Australian who maintains their Australian residency.

I. INTRODUCTION

The Australian government has introduced new laws to remove the main residence exemption from income tax on the capital gain for non-resident home owners. This has been initiated on the basis that it will make housing more affordable for Australian residents. The Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures (No.2)) Bill 2018 has serious implications for Australians wanting to work and live in an overseas country and change their residency status from that of Australia. In some cases, Australians need to live and work overseas for employment opportunities or for their career enhancement or even to maintain their employment if transferred by their employer. The consequences of changing residence mean that the family home, the main residence will be subject to income tax on the

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capital gain if sold while the owner lives overseas as a non-resident of Australia for taxation purposes. Home owners faced with paying income tax on the family home may be deterred from working and living overseas. In the Second reading speech by the then Treasurer; the Honourable Mr Scott Morrison he stated that the objective of the new law was as follows:

> The government wants all Australians to be able to buy a home, where they can, and access housing that is affordable. Housing is fundamental to the wellbeing of all Australians and is a driver of social and economic participation, promoting better employment, education and health outcomes. This bill implements measures announced in the government's 2017-18 budget housing package to improve housing affordability, encourage investment in affordable rental housing and improve the integrity of the tax system. The measures in this bill support those already introduced by the Turnbull government as part of the Treasury Laws Amendment (Housing Tax Integrity) Bill 2017 and the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 1) Bill 2017. This bill is an important step to ensuring homeownership is more achievable for Australians.[1]

These new measures have implications for those Australian residents that are faced with the prospect of working overseas and changing their residence status from that of Australia. The date of effect of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability No. 2) Bill 2018 is 7.30pm legal time in the ACT on 9 May 2017. At the time of writing this paper the Bill has not passed both Houses of Parliament, so the law will be applied retrospectively when it finally receives Royal Assent. There is a transition period for non-residents who sell their main residence before 30 June 2019. They will not be subject to income tax on their capital gain. The submission made by CPA Australia to the Senate Standing committee on Economics suggested that this may have an impact on the supply of housing as non-residents dispose of their dwelling before the end of the transition period.[2] This proposed law does not affect a foreign investor that does not live in their Taxable Australian Real Property (TARP) because the capital gain has never been exempt from income tax on the sale of their dwelling and they would not have received the 50 percent discount on any capital gain as that concession was abolished for foreign owners after 8 May 2012.

The objective of this paper is to critically analyse the implications for Australians faced with the need to move to another country for work purposes or retirement. There are two subsidiary implications that flow from this proposed law: first; will these measures actually make housing in Australia more affordable as the Australian Government contends, and second; will this impact on how an Australian resident will be assessed as a 'resident' or 'non-resident' when this law takes effect. The Board of Taxation has published their own review of the residency rules and have called on the public to provide submissions. If section 23AG of the *Income Tax Assessment Act 1936 (Cth)* (ITAA36) had not been repealed, then in certain circumstances, the salary or wage being earned by an Australian resident would have

[1] The Second reading speech by the Treasurer, the Honourable Mr Scott Morrison, Hansard, 8 February 2018, page 710.
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F31776340-cbfd-4793-af0f-753ff0be0a7d%2F0013%22>

[2] CPA Australia, Submission 10, Senate Standing Committee on Economics, 5 March 2018.

been exempt from further income tax in Australia and they would not have wanted to change their residency status from that of Australia. These implications will be examined in detail later in this paper.

In some cases, Australians need to live and work overseas for employment opportunities or for their career enhancement or even to maintain their employment if transferred by their employer. The consequences of changing residence mean that the family home, the main residence will be subject to income tax on the capital gain if sold while the owner lives overseas as a non-resident of Australia for taxation purposes. Home owners faced with paying income tax on the family home may be deterred from working and living overseas. The next Part of this paper will examine what constitute a 'main residence' for taxation purposes. Part III of this paper will provide an overview of the proposed changes to the CGT main residence exemption. Part IV will critically review the intended and unintended consequences that flow from this proposed law and what this means for Australians wanting to work in another country. This will include a detailed examination of what it means to be considered a resident or non-resident of Australia for taxation purposes. Part V of the paper will make recommendations on how the proposed law may be amended so that Australian residents who own their own family home may either avoid or reduce paying income tax on a capital gain that is exempt for every other Australian who maintains their Australian residency.

II. WHAT IS A 'MAIN RESIDENCE'?

The starting point for this paper is to determine what exactly is a 'main residence' for the purposes of the capital gains tax provisions. If a property is not a main residence for taxation purposes, then any capital gain is subject to income tax with or without a discount applying. This depends upon the circumstances of the taxpayer.

Currently the main residence is exempt from income tax on the capital gain for all Australian residents and Australian non-residents. As a result, the family home is the most tax effective investment in Australia.[3] In order to satisfy the 'main residence' exemption, the 'dwelling' must consist of residential accommodation contained in a building or a caravan, houseboat or mobile home.[4] The main residence exemption applies not just to a family home or family apartment but to other forms of residential accommodation. Section 118-100 refers to a 'dwelling' that is your main residence. The definition of what constitutes a dwelling is contained in subsection 118-115. The meaning of 'dwelling' is as follows:

> (1) A dwelling includes:
>
> (a) a unit of accommodation that:

[3] The capital gain on the sale of the main residence is not subject to income tax whereas any other form of investment in equities or bank interest is subject to income tax.
[4] Section 118-115.

(i) is a building or is contained in a building; and

(ii) consists wholly or mainly of residential accommodation; and

(b) a unit of accommodation that is a caravan, houseboat or other mobile home; and

(c) any land immediately under the unit of accommodation.

This means that the new law relating to the main residence exemption applies not only to family homes but also to a wider group of dwellings.

The definition of a 'dwelling' as a unit of accommodation has been extended to a shed containing a bed, mains water and a toilet.[5] A legal or equitable interest in the dwelling is sufficient for it to be a main residence and joint ownership of the dwelling is exempt if used as the main residence.[6] The main residence exemption is only available to individuals and not companies or trustees.[7]

Section 118-100, of the *Income Tax Assessment Act 1997* (Cth) (ITAA 97) states that you can ignore a capital gain or capital loss you make from a CGT event that happens to a dwelling that is your main residence. However, this exemption may not apply in full if:

- it was your main residence during part only of your ownership period; or
- it was used for the purpose of producing assessable income.

If the main residence is rented for the purpose of producing assessable income during the period of ownership, then that portion of time during which it was rented will be subject to income tax on any capital gain. However, s 118-145, ITAA 97 states that a main residence will maintain its exemption from income tax if it is only used for income producing purposes for a maximum of six years. These six years do not have to be consecutive. If the main residence is not used to produce assessable income and the owner is not residing in the main residence, then it maintains its exemption during the period of absence. The six-year time limit only applies if the main residence is producing assessable income.

III. THE PROPOSED AMENDMENT TO THE CGT PROVISIONS

The proposed amendments to the CGT provisions have implications for three groups of individuals that become non-residents of Australia while owning a 'main residence'. The first group are the existing non-residents or potential non-residents who own a main residence in Australia. If the main residence is not disposed of while the non-resident is living overseas, then no income tax implications arise. The disposition of the main residence is only subject to income tax if the owner is a non-resident at the time of sale. If the main residence is not sold

[5] *Summers and Federal Commissioner of Taxation* (2008) 71 ATR 279.
[6] See ATO Ruling IT 2485.
[7] Section 118-110(1)(a).

and the non-resident returns to Australia and takes up Australian residence, then no liability to tax arises on the subsequent sale of the main residence.

The second group effected by the proposed law are those non-residents who own a main residence in Australia but pass away while a resident of an overseas country. They may have retired to their country of birth but have maintained the family home in Australia. The home loses its main residence exemption and income tax is paid on the total capital gain at the non-residence rates of tax.

The third group are beneficiaries that are currently non-residents of Australia and they inherit a main residence in Australia. The home loses its main residency exemption when bequeathed to the non-resident beneficiary.

All of these circumstances are discussed in detail below. The Explanatory Memorandum to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures (No.2)) Bill 2018 provides a number of examples as the how the proposed law will operate. These examples are discussed below.

A *CGT Event A1 – sale of the main residence*

In the first example, the owner of the main residence is entitled to the exemption. James, a New Zealander, moves to Australia in July 2017 and obtains a special category visa. He purchases a dwelling in Australia and establishes it as his main residence. He is a resident of Australia for taxation purposes while he resides here. James continues to reside in the dwelling for several years. He signs a contract to sell the dwelling, departing Australia several months later (to return to live in New Zealand).

James was an Australian resident for taxation purposes at the time CGT event A1 occurs to the dwelling — that is, when he signs the contract to sell it. As James was not a foreign resident at the time CGT event A1 occurred he is entitled to the main residence exemption in respect of his ownership of the dwelling.[8]

In the next example, the main residence exemption is denied. Vicki acquired a dwelling in Australia on 10 September 2010, moving into it and establishing it as her main residence as soon as it was first practicable to do so. On 1 July 2018 Vicki vacated the dwelling and moved to New York. Vicki rented the dwelling out while she tried to sell it. On 15 October 2019 Vicki finally signs a contract to sell the dwelling with settlement occurring on 13 November 2019. Vicki was a foreign resident for taxation purposes on 15 October 2019.

The time of CGT event A1 for the sale of the dwelling is the time the contract for sale was signed, that is 15 October 2019. As Vicki was a foreign resident at that time she is not entitled to the main residence exemption in respect of her ownership interest in the dwelling.

Note: This outcome is not affected by:

[8] Explanatory Memorandum, Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018, 17.

- Vicki previously using the dwelling as her main residence; and
- the absence rule in section 118-145 that could otherwise have applied to treat the dwelling as Vicki's main residence from 1 July 2018 to 15 October 2019 (assuming all of the requirements were satisfied).

If Vicki had signed the contract for sale prior to the end of the transitional period, namely 30 June 2019, then the exemption would have applied.[9]

In the next example the owner of the main residence returns to Australia and then disposes of the family home. Amita acquired a dwelling in Australia on 20 February 2003, moving into it and establishing it as her main residence as soon as it was first practicable to do so. On 15 August 2020 Amita signs a contract to sell the dwelling and settlement occurs on 12 September 2020.

Amita used the dwelling as follows during the period of time for which she owned it:

- residing in the dwelling from when she acquired it until 1 October 2007;
- renting it out from 2 October 2007 until 5 March 2011 while she lived in a rented home in Paris as a foreign resident (assume the absence provision applies to treat the dwelling as her main residence);
- residing in the dwelling and using it as a main residence from 6 March 2011 until 15 April 2012;
- renting it out from 16 April 2012 until 10 June 2017 while she lived in a rented home in Hong Kong as a foreign resident (assume the absence provision applies to treat the dwelling as her main residence); and
- residing in the dwelling from 11 June 2017 until it was sold.

The time of CGT event A1 for the sale of the dwelling is the time the contract for sale was signed, that is 15 August 2020. As Amita was an Australian resident for taxation purposes at that time (as she had re-established her Australian residency) she is entitled to the full main residence exemption for her ownership interest in the dwelling as it is, or is taken to be, her main residence for the whole of the time that she owned it.[10]

B *Main residence sold due to the death of the non-resident owner*

If the deceased person was a foreign resident at the time of their death, then the portion of the main residence exemption accrued by the deceased in respect of the dwelling is not available to the beneficiary. The beneficiaries continue to be entitled to the main residence exemption for any part of the exemption that they accrue in their own right (provided that they are not a foreign resident at the time the CGT event for the ownership interest in the dwelling occurs).

The main residence exemption does not apply if:

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[9] Explanatory Memorandum, Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018, 18.

[10] Explanatory Memorandum, Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018, 18.

- the deceased person was a foreign resident at the time of their death; and
- the beneficiary that inherits the ownership interest in the dwelling was a foreign resident at the time the CGT event occurs. If the main residence exemption does not apply the beneficiary must account for the whole of the capital gain or loss that accrues on the ownership interest in the dwelling.

The following example taken from the Explanatory Memorandum illustrates how the above provisions will operate:

Edwina acquired a dwelling on 7 February 2011, moving into it and establishing it as her main residence as soon as it was first practicable to do so. Edwina used the property as follows:

- residing in the dwelling until 25 September 2016; and
- renting the property out from 26 September 2016 at which time Edwina moved to Johannesburg.

Edwina passed away on 20 January 2018. At this time, she was a foreign resident for taxation purposes. Rebecca inherits the dwelling from Edwina. Rebecca moves into the dwelling and establishes it as her main residence on 21 January 2018. She continues to reside in it and use it as her main residence until she sells it. She signs the contract to sell the dwelling on 2 February 2020 (at time she is a resident of Australia for taxation purposes) with settlement occurring on 2 March 2020.

The deceased estate main residence exemption provisions apply to Rebecca's sale of the dwelling as follows:

- the period that Edwina owned the dwelling (2,539 days) is treated as non-main residence days (as Edwina was a foreign resident at the time of her death); and
- the period from when Rebecca moved into the property until she signed the contract for sale (the date of CGT event A1) of 742 days are main residence days as she used the property as her main residence for the whole of this time.

The capital gain or loss amount is the amount that the capital gain or loss would be if no main residence exemption applied. It is assumed, for the purposes of this example, that the capital gain amount for the dwelling is equal to $100,000.

Therefore, Rebecca's capital gain or capital loss from the dwelling is equal to:

$$= \text{CG or CL amount} \times \frac{\text{Non-main residence days}}{\text{Days in ownership period}}$$

$$= \$100{,}000 \times \frac{2{,}539}{3{,}281}$$

$$= \$77{,}385$$

Rebecca then reduces the capital gain by any current income year and prior income year capital losses and any capital gains discount. She then adds to the resulting capital gain the

amount of any other capital gains she has realised during the income year (if any). The result is her net capital gain which she must include in her assessable income for the 2019-20 income year. [11]

C *Main residence bequeathed to a non-resident*

The following example taken from the Explanatory memorandum illustrates the implications for a non-resident beneficiary inheriting a main residence. In this example a foreign resident beneficiary inherits a main residence from a deceased person who was an Australian resident at the time of death:

Con acquired a dwelling on 7 February 2001, moving into it and establishing it as his main residence as soon as it was first practicable to do so. He continued to reside in the property and it was his main residence until his death on 9 August 2017.

Jacqui, Con's daughter, inherited the dwelling following Con's death. Upon inheriting the dwelling, Jacqui rented it out. It was not her main residence at any time. On 25 January 2021 Jacqui signs a contract to sell the dwelling and settlement occurs on 23 February 2021. Jacqui resides in Buenos Aires and is a foreign resident for the whole of the time she has an ownership interest in the dwelling.

Jacqui is entitled to a partial main residence exemption for the ownership interest that she has in the dwelling at the time she sells it, being the exemption that accrued while Con used the residence as his main residence (7 February 2001 until 9 August 2017). She is not entitled to any main residence exemption that she accrued in respect of the dwelling (9 August 2017 until 25 January 2021). This is because she was a foreign resident on 25 January 2021, the day on which she signed the contract to sell her ownership interest, which is the day on which CGT event A1 occurred.

Note: Jacqui will need to apply section 118-200 to work out the amount of the capital gain or loss that she realises from the sale of the ownership interest in the dwelling.

Instead, if Jacqui had sold the dwelling on or before 9 August 2019 she would have been entitled to a full main residence exemption. This is because the whole of the main residence exemption would have, or would be taken to have, accrued from Con's use of the residence. This includes the two-year period following Con's death.[12]

D *Effect of the transitional rules*

[11]Explanatory Memorandum, Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018, 25.

[12] Explanatory Memorandum, Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018, 22.

The following example illustrates how the transitional rules apply to a disposition of a main residence. A main residence that was owned before 9 May 2017 is disposed of on or before 30 June 2019. Samantha acquired a dwelling on 13 April 2013 moving into it and establishing it as her main residence as soon as it was first practicable to do so. On 10 January 2019 Samantha signs a contract to sell the dwelling and settlement occurs on 7 February 2019.

Samantha used the dwelling as follows when she owned it:

- residing there until 15 September 2016; and
- renting the property out from 16 September 2016 until it was sold (assume the absence provision applies to treat the dwelling as her main residence during this later period).

From 16 September 2016 Samantha resided in rented accommodation in Bahrain and was a foreign resident. CGT event A1 for the sale of the dwelling occurs when the contract for sale was signed, that is 10 January 2019. As Samantha held her ownership interest in the dwelling on or before 9 May 2017, she continued to own it until it was sold and as it was sold before 1 July 2019 she is entitled to the main residence exemption under the transitional rule.[13]

IV. RESIDENCY AND THE IMPACT OF THE PROPOSED LAW

How the proposed amendments to the CGT provisions will affect Australians moving overseas for employment and becoming a non-resident will only become clear after the end of the transition period, 30 June 2019. The full impact of the proposed law will apply when the main residence is being sold outside of the transition period. One of the major implications is whether Australians living and working overseas maintain their status as a resident for tax purposes so that any future sale of the main residence will still be exempt from CGT. For example, an Australian living overseas for a number of years decides to sell their main residence but does not include any of the capital gain in their Australian assessable income. The ATO then issues an assessment but the Australian claims that they are a resident and that they had no intention of changing their residency status. How will the ATO determine if they have changed their residence? In most cases Australians working and living overseas in a low tax country go to extraordinary length to prove that they are not a resident of Australia for tax purposes. However, with the introduction of these proposed CGT amendments, taxpayers may be arguing the opposite case. Namely, that they have maintained their Australian residency for taxation purposes. In order to examine this last issue, it is necessary to review the current law relating to what constitutes 'residence' in Australia.

[13] Explanatory Memorandum, Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018, 30.

Australian resident taxpayers may wish to be considered to be non-residents if they are employed in a foreign country where the personal rates of income tax are nil or less than that paid in Australia. For example, individual income tax rates in countries such as Singapore, Hong Kong and many Middle Eastern countries have considerably lower rates than those applied in Australia and therefore the attractiveness of becoming a non-resident taxpayer are obvious. In that case there is a distinct advantage in not being taxed in Australia as a resident particularly if the period of employment is for several years. However, if that same taxpayer was deriving considerable income from investments in Australia then by maintaining their Australian tax residency they would not be subject to the higher rates of personal income tax that apply to non-residents on their Australian sourced income. For example, a resident is entitled to the tax-free threshold of $18,200 whereas a non-resident pays income tax at the rate of 32.5 percent on each dollar of taxable income up to $87,000 where the tax rate increases to the next marginal rate of 37 percent.

The common Law in relation to the issue of residency of an individual was relatively settled in Australia with very few Court decisions by the Full Federal Court of Australia, the Federal Court of Australia and the Administrative Appeals Tribunal (AAT) on the meaning of 'resides in Australia', 'domicile', 'permanent place of abode' and usual place of abode'. According to Professor Dirkis this was the due to the fact that employment income was generally exempt from further income tax pursuant to s 23AG, ITAA 36.[14]

Professor Dirkis has examined over 30 new cases since 2010 relating to the application of 'resides' and 'domicile' tests;[15] the determination of 'permanent place of abode';[16] the application of the 183 days test;[17] the application of the 'superannuation' test;[18] the application of the treaty tie-breaker test;[19] and related matters with the onus of proof in the context of the former s 23AG,[20] and the impact that this litigation has had on the

[14] Michael Dirkis, 'The ghosts of Levene and Lysaght still haunting 90 years on: Australia's "great age" of residence litigation?', (2018) 47 *Australian Tax Review* 41, 45.

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

[16] *Re Boer and Commissioner of Taxation* [2012] AATA 574 and *Mayhew and Commissioner of Taxation* [2013] AATA 130.

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

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

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

[20] *Shord v Commissioner of Taxation* [2016] FCA 761 (s 23AG(7) & onus - Appeal lodged 29.7.16) (being an appeal from *Re Shord and Commissioner of Taxation* [2015] AATA 355 (resident test)) and *Boyd and FCT* [2013] AATA 494 (s 23AG), *Horrocks v Commissioner of Taxation* [2010] AATA 307 and *Mulherin v FCT* [2013] FCAFC 115 (dismissed appeal from *Murray and Commissioner of Taxation (No 3)* [2012] AATA 557) (on onus of proof) and *Commissioner of Taxation* v *Seymour* [2015] FCA 320 (reversing order allowing video evidence in *The*

understanding of the concept of residence in Australia. These observations are incorporated into the following examination of residence in Australia.

An individual will be considered to be a resident of Australia for tax purposes if they satisfy any one of the following four statutory tests.

A *Statutory Tests for Residency*

The Explanatory Memorandum to the Bill[21] states at paragraph 1.21 that an individual is a foreign resident if they are not an Australian resident for taxation purposes, as defined in Section 6(1) of the ITAA36. Individuals who are Australian residents for taxation purposes at the time a CGT event occurs to a dwelling are not affected by this measure. A resident individual is defined as a person who is a resident by the definition contained in s 6(1) of the ITAA 36 and states that 'resident' or 'resident of Australia' means:

> (a) a person, other than a company, who resides in Australia and includes a person:
>
> > (i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;
> >
> > (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia; or
> >
> > (iii) who is: … (A) a member of the superannuation scheme established by deed under the Superannuation Act 1990; or (B) an eligible employee for the purposes of the Superannuation Act 1976; or the spouse, or a child under 16, of a person covered by sub-subparagraph (A) or (B).

I *Meaning of 'Resides'*

The first test concerns the individual who resides or lives in Australia, whereby the 'ordinary' meaning of the term 'resides' is applied to the taxpayer. This test is also referred to as the 'ordinary concepts' test whereby the common law is used to describe what is meant by the term 'reside'. The United Kingdom case of *Levene v IRC* [1928] AC 217 and the judgment of Viscount Cave LC is the most quoted statement on the interpretation of 'residence':

> [T]he word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live at a particular place". … In most cases there is no difficulty in determining where a man has his settled or usual place of abode, and if that is ascertained he

Overseas Applicants and Commissioner of Taxation [2014] AATA 788) and *Seymour and Commissioner of Taxation* [2016] AATA 397.

[21] Explanatory Memorandum, Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018.

> is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.

The facts in the Levene case help to illustrate what is meant by the term 'reside'. Levene had been a resident of the UK but when he retired and sold his business he lived for five years in hotels in the UK and abroad. He returned to the UK each year for a period of four months to receive medical treatment and attend religious ceremonies. The House of Lords held that it was only when he obtained a lease of a flat in Monte Carlo some five years later that he ceased to be a resident of the UK for taxation purposes. He exhibited ongoing ties with the UK and his stays abroad were seen as being of a temporary nature.

The Australian Taxation Office issued a ruling, TR 98/17 which is designed to cover the situation with non-resident individuals living in Australia. The ruling only applies to the following individuals:

- migrants;
- academics teaching or studying in Australia;
- students studying in Australia;
- visitors on holiday; and
- workers with pre-arranged employment contracts.

The ruling examines the common law factors that are taken into consideration when determining whether or not an individual living in Australia is considered a resident for taxation purposes. A period of residence of six months or more may be a determinant but also factors such as the purpose of the visit; location and maintenance of assets; family ties and social and living arrangements. Foreign students are considered to be residents because virtually all course last for more than six months. Many of the common law factors discussed below in relation to Australian residents ceasing to live in Australia and becoming non-residents apply to those individuals covered by TR 98/17.

A number of factors need to be taken into account when determining if an Australian taxpayer has changed their residency. These broad factors should be considered in that determination:

(i) The physical presence in Australia and the frequency of visits to Australia by a taxpayer are of vital importance because if they continually return to Australia for family, business or personal reasons then they may not be exhibiting the type of conduct necessary to show that they reside in a foreign country. This was the situation in the case of *Re Shand and Federal Commissioner of Taxation* (2003) 52 ATR 1088 where the Administrative Appeals Tribunal affirmed an Objection decision to treat the taxpayer as a resident of Australia even though during the disputed years he spent a considerable time in Kuwait and Canada for business purposes. The taxpayer had a family home in Queensland where his wife, children and grandchildren lived. The taxpayer maintained his medical insurance; took out Australian citizenship; set up a self-managed superannuation fund; stated on his immigration form when departing and returning to Australia that he was a resident departing and arriving; his money from his overseas business was paid into his Australian bank account; and he gave as his address for all banking details his address in Australia. The maintenance of a home in

Australia may be a strong indication that the taxpayer intends to remain an Australian resident. In terms of the proposed amendments to the CGT provisions relating to the main residence, the fact that the taxpayer has not sold the family home may work in their favour that they are still an Australian resident for taxation purposes.

A further example of the importance of 'physical presence' is found in the case of *Joachim v Federal Commissioner of Taxation* (2002) 50 ATR 1072 where the AAT held that once a person has established a home in a particular place their physical presence in that country during the income year is a relevant factor. However, it is not necessary that they are physically present for a particular part of the year. It is sufficient that they have an intention to return and to continue to treat that place as home. In the recent case of *Iyengar v Commissioner of Taxation* [2011] AATA 856, Senior Member Walsh considered 'physical presence' as the first item of a 'checklist' to be considered in determining the residence of the taxpayer. In this case Mr Iyengar maintained a limited physical presence in Australia and in the Middle East but he retained a continuity of association through his family home in Perth with Australia during the relevant income years and intended to return to Australia on completion of his contract of employment. In his judgment, Senior Member Walsh provided a checklist of factors to be taken into account but noted that weight should be given to each factor and that it would vary with the individual and that no one factor is decisive. Those factors included not only physical presence but also nationality; history of residence and movements; habits and 'mode of life'; frequency, regularity and duration of visits; purpose of visits to or absences from a country; family and business ties with a country; and maintenance of a place of abode.

There is a danger in relying on a list of factors when determining the residence of a taxpayer. This was pointed out by Justice Logan, Presidential Member Hack and Senior Member Kenny in the case of *Re Dempsey and Commissioner of Taxation* [2014] AATA 335 when they made the following statement:

> However useful such checklists may be, they are no substitute for the text of the statute and the recollection that ultimate appellate authority dictates that the word "resides" be construed and applied to the facts according to its ordinary meaning.

(ii) Family or business ties in Australia may be such that the taxpayer is still regarded as being a resident even though they live and work in a foreign country. This is particularly so when a taxpayer leaves their spouse and children in Australia while they work overseas. In the case of *Joachim v Federal Commissioner of Taxation* (2002) 50 ATR 1072, the Administrative Appeals Tribunal held that even though the taxpayer spent more than 80 percent of his time on ships outside Australia, the fact that his family resided in Australia and he spent his leave with them meant that he was still a resident of Australia according to the ordinary concepts of residence. A similar finding as that of above can be found in the case of *Re Shand and Federal Commissioner of Taxation* (2003) 52 ATR 1088 where Deputy President Muller held that 'the evidence shows that although Mr Shand spent a significant amount of time in Kuwait during the relevant tax years, he spent almost as much time in Australia. His personal effects and emotional ties were within Australia, whereas the only factor which tied him to Kuwait was his business.'

(iii) The quality of the accommodation in the foreign country will also be taken into account when determining the status of the taxpayer. For example, in the case of *Re Shand and*

Federal Commissioner of Taxation the taxpayer lived in a furnished apartment and only took with him sufficient clothing for his brief stays. It was therefore very difficult for him to show that he resided outside Australia in a permanent home environment when his accommodation was not consistent with his situation in Australia. This situation is also reinforced by the Administrative Appeals Tribunal decision in the case of *Re Crockett and Federal Commissioner of Taxation* (1998) 41 ATR 1156 where the taxpayer was unable to show that he had a sufficiently permanent place of abode outside Australia in order to overcome the evidence that his family home was in Australia; his family lived in Australia; and that he took out Australian citizenship. In the case of *Iyengar v Commissioner of Taxation*, Senior Member Walsh considered whether Iyengar had demonstrated that he had a permanent place of abode outside Australia. Walsh held that Iyengar had not demonstrated that his permanent place of abode was in fact Dubai and later Doha but that his 'family home' was in Australia with his wife and that he sent almost all of the income he earned back to Australia in order to pay the mortgage. He had only taken a few personal items with him overseas such as clothing and other household items.

II *Australian Domicile*

The second test refers to a person whose domicile is Australian, and as a result demonstrates strong ties with Australia, unless the Commissioner of Taxation is satisfied that their 'permanent place of abode' is outside Australia. The term 'domicile' is a legal concept defined under the *Domicile Act 1982* (Cth) and the common law. The term 'domicile' must be read with reference to a particular country in that the laws of that country will apply to the particular person together with legal rights and duties. There are three types of domicile: domicile of origin; domicile of choice and domicile of dependency. For example, a person born in a particular country acquires a domicile of origin and may at a later time acquire a new domicile, a domicile of choice, when they move to another country with the intention of permanently living there, s 10, the *Domicile Act 1982*.

For taxation purposes, a taxpayer who was born in Australia, or has moved to Australia with the intention of living there permanently, will have an Australian domicile and is regarded as being a resident for tax purposes. However, pursuant to the above definition, if the Commissioner is satisfied that their permanent place of abode is outside Australia, they may not be regarded as being an Australian resident for taxation purposes. Franki J of the Full Bench of the Federal Court of Australia in the case of *Federal Commissioner of Taxation v Applegate* (1979) 9 ATR 899 provides the best statement of what is meant by "permanent place of abode":

> [T]he phrase 'permanent place of abode outside Australia' is to be read as something less than a permanent place of abode in which the taxpayer intends to live for the rest of his life.

In this case, the taxpayer was held to be a non-resident for tax purposes during the period of absence from Australia. The taxpayer had a permanent job in another country; he had no home in Australia; no Australian source income; and he had established a permanent home in the other country. He returned after only being away for 2 years due to an illness. In the similar case of *Federal Commissioner of Taxation v Jenkins* (1982) 12 ATR 745 the taxpayer

returned to Australia after only 18 months of living and working in the New Hebrides due to illness. He had not been able to sell the family home in Australia but had leased it out. He originally had no fixed time to return to Australia when he commenced work for a bank in the New Hebrides.

The ATO issued a ruling, IT 2650 to provide guidelines as to what factors would be taken into account when an Australian resident works or studies in a foreign country and wants to be regarded as a non-resident for taxation purposes. The Commissioner provides the following statement in the ruling which outlines the factors that are taken into account when determining residency each financial year:

It is clear from Applegate and Jenkins that a person's permanent place of abode cannot be ascertained by the application of any hard and fast rules. It is a question of fact to be determined in the light of all the circumstances of each case. Some of the factors which have been considered relevant by the Courts and Boards of Review/Administrative Appeals Tribunal and which are used by this Office in reaching a state of satisfaction as to a taxpayer's permanent place of abode include:

(a) the intended and actual length of the taxpayer's stay in the overseas country;

b) whether the taxpayer intended to stay in the overseas country only temporarily and then to move on to another country or to return to Australia at some definite point in time;

(c) whether the taxpayer has established a home (in the sense of dwelling place; a house or other shelter that is the fixed residence of a person, a family, or a household), outside Australia;

(d) whether any residence or place of abode exists in Australia or has been abandoned because of the overseas absence;

(e) the duration and continuity of the taxpayer's presence in the overseas country; and

(f) the durability of association that the person has with a particular place in Australia, i.e. maintaining bank accounts in Australia, informing government departments such as the Department of Social Security that he or she is leaving permanently and that family allowance payments should be stopped, place of education of the taxpayer's children, family ties and so on.

The Commissioner contends that his office would regard a stay of 2 years or more to be a substantial period, however, if the taxpayer had no fixed place of abode while absent from Australia for 2 or more years then they would still be regarded as having an Australian domicile. The Commissioner considers that the home that is established overseas should be relatively substantial and not such a thing as a mining town, barracks, or an oil rig. Similarly, maintaining bank accounts in Australia and having the children attend schools in Australia may be a factor that weighs against a finding that the taxpayer was a non-resident during the period of absence. It should be noted that tax rulings are binding on the Commissioner but not on taxpayers.

In the recent Administrative Appeals Tribunal decision in *Re Mynott v Commissioner of Taxation* [2011] AATA 539, the tribunal held that the taxpayer was not a resident of Australia for taxation purposes even though he moved extensively around the world in order

to obtain work as an electronics engineer. The decision by Senior Member Dunne was based on the fact that the taxpayer had sold his assets in Australia prior to leaving except for a few personal items that were left with his parents in Adelaide, South Australia. He maintained a bank account with a credit union in Adelaide. Even though he had no substantial home associated with his work, he maintained rented premises for his defacto wife and her children from a previous marriage, in the Philippines. He did not stay for lengthy periods in the Philippines but this was sufficient for him to establish a permanent place of abode.

III *The 183 day Test*

The third test refers to an individual who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia, s 6(1)(a)(ii), ITAA 36. This test has been applied to taxpayers living in Australia, rather than Australian residents living in a foreign country for more than half a year. The important thing to note with this test is that it is based on the year of income. Therefore, a temporary worker being employed say from April to October would not be regarded as a resident under this test as they have only spent 90 days of each financial year, i.e. 90 days up to 30 June and 90 days from 1 July to 1 October. Similarly, a foreign taxpayer working in Australia from 1 January will be only able to claim half a financial year's tax-free threshold. Any foreign sourced income earned in the first half of the financial year will not be taxed in Australia as they only commenced to be a resident from 1 January.

Migrants moving to Australia are regarded as satisfying this test if they live in Australia for more than 183 consecutive days and have no usual place of abode in another country. The reference to "usual place of abode" rather than "permanent place of abode" would indicate that the government intended a less stringent test to apply to the taxpayer so that they could be considered to be a resident even if they were working in Australia. The Commissioner has issued a tax ruling, IT 2681 to cover business migrants.

This test was recently subject to extensive litigation in relation to people working and living in Australia on working holiday visas more commonly referred to as working 'backpackers'. The issue was that they claimed that they were residents because they were living in Australia for more than 183 days. The ATO argued that even though they lived and worked in Australia they still maintained a 'usual place of abode' in their home country. In the case of *Groves v Commissioner of Taxation* [2011] AATA 609, Deputy President Handley held that that the British citizen did satisfy the 183 days test because his parents' home in the UK did not constitute his usual place of abode. He had no place of abode in the UK. Similarly, in the case of *Guissouma v Commissioner of Taxation* [2013] AATA 875, Senior Member Lazanas held that Mr Guissouma was a resident as he satisfied the 183 days test. The fact that his parents lived in France was not sufficient to find that his usual place of abode was France.

The ATO then selected three backpackers that were more mobile in their living arrangements in Australia and sought agreement that they would only argue that they were residents on the basis of the 183 days test. Deputy President Deutsch delivered three separate decisions in the cases of Re Clemens v Commissioner of Taxation [2015] AATA 124, *Re Jaczenko v*

Commissioner of Taxation [2015] AATA 125 and *Re Koustrup v Commissioner of Taxation* [2015] AATA 126 and held that in each case the taxpayers did not satisfy the 183 days test as each had maintained their usual place of abode outside Australia.

Pre-empting the result of these cases and the fact that the Australian Government was having difficulty in imposing income tax on these working 'backpackers', they introduced the so-called 'backpacker' tax.[22]

IV *Commonwealth superannuation fund membership*

The fourth test refers to Australian public servants who are attached to foreign embassies and foreign government offices, and on secondment to foreign government agencies, being a resident of Australia by virtue of being a member of the Commonwealth superannuation fund, which is compulsory for public servants employed by the Commonwealth Government. In many cases the public servant may be absent from Australia for many years, but they retain their obligation to pay income tax as a resident of Australia for taxation purposes.

C *Board of Taxation Review of the Residency Rules for Individuals*

The Board of Taxation is currently reviewing the income tax residency rules for individuals.[23] The Board's core finding was that the current individual tax residency rules were no longer appropriate and required modernisation and simplification. The Board completed its review of the Income Tax Residency Rules for Individuals in August 2017 and provided a copy to Government. He Government supported the view of the Board that further consultation was required and in September 2018 the Board produced a consultation guide seeking responses to specific questions based on their earlier recommendations.[24] The Board of Taxation has stated in its report that the Government will receive a final report in November 2018.[25]

It is important to briefly examine the recommendations of the Board of Taxation in order to assess their likely impact on the proposed changes to the main residence exemption. Theses proposed rules for determining the residence of an individual may be critical in imposing income tax on the capital gain derived from the sale of the main residence if there is doubt as to the status of that individual when the family home was sold.

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[22] *Treasury Laws Amendment (Working Holiday Maker Reform) Act 2016*; *Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016*; *Superannuation (Departing Australia Superannuation Payments Tax) Amendment Act 2016* and *Passenger Movement Charge Amendment Act 2016*. These measures, which applied from 1 January 2017, impose a 15 per cent income tax rate to taxable income up to $37,000 earned by an individual holding a subclass 417, Working Holiday visa or subclass 462, Work and Holiday visa or bridging visa permitting the individual to work in Australia where the bridging visa was granted under the *Migration Act 1958* in relation to an application for one of the those visas.[22]

[23] Board of Taxation, *Review of the Income Tax Residency Rules for Individuals* (2017) < http://taxboard.gov.au/consultation/self-initiated-review-of-the-income-tax-residency-rules-for-individuals/>

[24] Board of Taxation, Consultation Guide, (September 2018) <https://cdn.tspace.gov.au/uploads/sites/70/2018/09/BoT-Residency-Consulation-Guide-FINAL.pdf>

[25] Ibid, 27.

The following statement by the Board illustrates the approach being taken in determining residency:

> Whether you are an Australian resident for tax purposes is based on both your time spent in Australia and the nature and quality of your ties to Australian society. The more substantial your ties to Australia, the more likely you will be a resident. This Division determines your residency status by considering the relevance of your ties and calculating your time spent.[26]

The Board is focusing on both the time spent in or out of Australia as a primary test that provides a 'bright-line' for most individuals. They believe that if the test is based on days it will take the complexity out of the current tests and provide certainty.[27] Having a 'bright-line' test is similar to the UK, but it has been adopted for an Australian context. The number of days has not been specified at this stage, but it will differ for those individuals coming into Australia and those individuals previously a resident of Australia.[28]

If an individual does not satisfy any of the 'bright-line' tests, the Board contends that the preferred approach would be to apply a secondary test, called the 'factor test'. The factors are set out below alongside a description of each factor.

Time spent in Australia	A factor is satisfied if an individual spends sufficient time in Australia: – A set number of X days or more if previously a resident; and – A larger set number of Y days or more if never an Australian resident. Both tests would be less than 183 days for the factor to be useful (otherwise the individual would automatically be a resident). The number of days for an individual previously a resident should also be lower than a non-resident, in line with the adhesive principle.
Immigration status	A factor is satisfied if the individual is an Australian citizen or permanent resident
Family	A factor is satisfied if an individual's family (or relevant social grouping) is largely located in Australia
Australian accommodation	A factor is satisfied if an individual has readily accessible Australian accommodation (owned or rented) that the individual actually uses throughout the income year
Economic ties	A factor is satisfied if an individual has substantial Australian economic ties (such as employment or business interests)

The Board suggests that these factors reflect the key issues covered in the case law and ATO determinations. However, the Board is seeking views from the public on this approach. The Board examines the situation where an Australian resident changes to that of a a non-resident and what would be required in order to maintain the integrity of the system. The following statement provides a clear guide as to their approach:

[26] Ibid, 8.
[27] Ibid, 9.
[28] Ibid, 11.

> In the Board's report, the suggested approach is that where an individual has been an Australian resident and would otherwise satisfy the conditions to become a non-resident, the change in status will only be effective if the individual can demonstrate that they have established residency in another country. That is, individuals remain Australian residents unless and until tax residency is established in another jurisdiction.
>
> The way in which an individual demonstrates residency is a complex design issue. The Board is considering a number of alternatives to improve the integrity of the new residency rules, including a number based on international comparisons.[29]

What this means for an Australia resident moving to another country to work and live is that it may make it easier to maintain their Australian residency status and not effect their main residence if it was subsequently sold while they were living and working overseas. The Board seems determined to stop Australians reducing their income tax by moving to low tax jurisdictions and tax havens by tightening the residency rules. However, their approach may be greatly advantageous for an Australian working and living overseas for a number of years but not wanting to put at risk their main residence exemption. The approach being considered by the Board is set out below:

> A rule could be adopted to impose tax on income and gains that arise during short term absences from Australia. In essence, this rule targets schemes that rely on brief periods of non-residency where the individual never intends to actually cut ties with Australia.
>
> In the UK, temporary non-residents are charged to tax on specified income and gains (in particular, capital gains, distributions from closely controlled companies, certain pensions or lump sum payments etc.). A temporary period of non-residence is:
>
> – where an individual was previously a 'sole' UK resident and subsequently does not have sole UK residence (ie, the sole requirement meaning the individual is not a non-resident and not a foreign resident under a double tax treaty);
>
> – in the immediately preceding 7 tax years, 4 or more must have included a period in which the individual was a 'sole' UK resident; and
>
> – the period of non-residence is 5 years or less.
>
> Upon resuming residency, the individual is required to pay tax on the relevant income and gains. An approach of this kind in Australia would provide certainty by simply adopting a rule that eliminates the incentive to become a non-resident for a short period of time simply for tax reasons. It also likely reduces collection difficulties that may arise for the measures outlined above. While it will also impact Australian expatriates should they spend up to 5 years abroad by imposing tax upon their return, it would be expected that any foreign employment income would be excluded from such a tax.[30]

If the Government eventually adopted this approach to Australian changing their residency in order to take advantage of low tax jurisdictions, then it may present an opportunity for taxpayers with a main residence continuing to maintain their Australian residence without a great deal of difficulty. They would need to plan extended holidays in Australia and maintain a connection with Australia. The main residence is a good example of the connection with Australia.

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[29] Ibid, 17.
[30] Ibid, 19.

V. HOW DOES THIS PROPOSED LAW MAKE HOUSING MORE AFFORDABLE?

A number of public submissions on the proposed law were received by the Australian Senate, the Economics Legislation Committee in 2018.[31] The Senate Report notes that the submissions that they received in relation to housing affordability did not express any assurance in these CGT measures having any effect on housing affordability. In fact, the submissions thought the opposite.[32] A non-resident Australian owning a main residence would now be less inclined to sell their family home until they returned to Australia as a resident otherwise they would be paying a substantial amount of income tax on the capital gain. [33] There is a transition period for non-residents who sell their main residence before 30 June 2019. The submission made by CPA Australia to the Senate Economics Legislation Committee suggested that this proposed law may have an impact on the supply of housing as non-residents dispose of their dwelling before the end of the transition period.[34] If the Australian non-resident does not sell their main residence when they are living and working in another country, then this will have a neutral impact on the supply of housing and housing affordability. But, if the property has not been sold and therefore is not available for purchase, it may be rented while the owners are living overseas, and this may help the supply of property for rental purposes but again does not make housing more affordable. In this respect any assessment will have to wait until after 30 June 2019.

The problem of 'housing affordability' is a complex issue and it is not intended in this paper to undertake a substantial discussion of the current situation in Australia. However, given that the basis for introducing this new law is that it will make housing more affordable, it is necessary to briefly examine the factors involved and to assess the Government's assertions. Otherwise, why not simply present these amendments to the CGT main residence exemption as a tax reform measure which may herald other reforms to the CGT provisions. It would appear that housing affordability is related to the cost of housing and currently in Australia the price of housing is falling in some cities.

In the latest CoreLogic report on Housing Affordability Report for Australia, the report makes the following observation on the current situation in Australia: [35]

> Although housing affordability has recently started to improve, due to falling prices while incomes inch higher and mortgage rates remain low, the longer run view has seen housing affordability across the nation deteriorate. While this trend is clearly evident cumulatively across most regions of Australia over the past two decades, the past ten years has seen worsening housing affordability being fuelled primarily by strong growth in property prices across Sydney, Melbourne, Regional NSW and more recently Hobart. While Sydney and Melbourne are the two largest cities and have a strong influence over the national trends,

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[31] Commonwealth of Australia, The Senate, Economics Legislation Committee, March 2018.
[32] Ibid, 12.
[33] Ibid, 13.
[34] CPA Australia, Submission 10, Senate Standing Committee on Economics, 5 March 2018.
[35] CoreLogic, Housing Affordability Report for Australia, June Quarter. <http://reports.corelogic.com.au/CL-HOUSING-AFFORDABILITY/CL-HOUSING-AFFORDABILITY-5261534F.pdf>

> outside of these markets property price growth has been limited and in many instances housing affordability has been improving as incomes rise and mortgage rates have reduced.[36]

Housing affordability relates to the cost of housing in terms of purchase price, mortgage payments or rent as a proportion of the income being derived by Australian individuals. The Reserve Bank of Australia (RBA) made a Submission to the 'Inquiry into Home Ownership', House of Representatives Standing Committee on Economics in June 2015 and that report provides an insight into the complex issues that relate to housing affordability.[37] The RBA made the following finding into how housing may become more affordable:

> While it is undeniable that more younger households would be able to purchase a home if housing prices were significantly lower relative to their incomes, there are no examples internationally of large falls in nominal housing prices that have occurred other than through significant reduction in capacity to pay (e.g. recession and high unemployment). There is no mechanism to get a large and sustained level shift down in prices while a substantial fraction of the population can – safely and sustainably – service the obligations involved in paying the higher price. Additional housing supply ought to dampen housing prices, and more probably will reduce the growth rate of housing prices that occurs in response to increases in demand for housing. There is, therefore, an argument for government policy to avoid creating unnecessary barriers to supply. However, there is no example in Australia or internationally where supply expansion on its own generated housing price declines of a similar order of magnitude to the increases in prices seen in some Australian cities in recent years; some academic work on this issue suggests that removing supply constraints in a single population centre might not reduce prices significantly. [38]

It is very difficult to see how this new law will make any substantial difference to housing affordability in Australia. It is apparent from the above authorities on housing that purchase price is a major issue for affordability. Some main residences in Australia may be sold prior to the expiry of the transitional period and some main residences may be sold earlier than expected if the owners decide to live and work overseas for a substantial period. But, it may be that governments may want to consider imposing income tax on capital gains made from the sale of all real property in Australia including the main residence. This could be the first step in such a program.

VI. OPTIONS AND RECOMMENDATIONS

CPA Australia made a submission to the Australian Senate, Economics Legislation Committee on the views of their members to the proposed amendments to the main residence

[36] Ibid, 4.
[37] The Reserve Bank of Australia, Submission to the Inquiry into Home Ownership House of Representatives Standing Committee on Economics (June 2015). < https://www.rba.gov.au/publications/submissions/housing-and-housing-finance/inquiry-into-home-ownership/pdf/inquiry-into-home-ownership.pdf>
[38] Ibid, 25.

exemption.[39] They formulated the following options that should be considered by the Committee. Options to improve the Bill include:

- that persons who retain their Australian citizenship or permanent residency be excluded from the provisions of the Bill – regardless of their tax residency
- the proposed regime only applies to property acquired from 9 May 2017
- the cost base of the property to be reset to its market value on the day the taxpayer becomes a non-resident so that the capital gain is calculated on the increase in value since the taxpayer ceased to be a resident
- a partial exemption for the number of days the taxpayer was a resident and lived in the dwelling as their main residence.[40]

The proposed law effectively takes into account any capital gain that has accrued to a non-resident from 20 September 1985, the date that the CGT requirements commenced in Australia. The CPA Australia submission stated that many Australian taxpayers may not have sufficient records or other details to be used in the cost base calculation when the home is sold given that it was the main residence and not, as far as they were concerned, subject to income tax on the capital gain.

If this proposed law comes into effect, then the following recommendations should be considered for an Australian resident faced with the prospect of living and working overseas for an extended period of time are as follows:

- Continue to maintain their Australian residency by lodging a tax return each year and pay income tax in both the foreign country and Australia. They may be entitled to claim a tax credit for income tax paid in the foreign country. They would continue to pay the Medicare Levy but at the same time avail themselves of the tax-free threshold as a resident. By doing this the main residence exemption is maintained. The fact that they still maintain a main residence in Australia is strong evidence of the continued ties to Australia in support of this contention.
- Sell the family home to a family member or at arms length to the public and pay no income tax on the capital gain. They have until 30 June 2019 to sell.
- Become a resident of another country and do not sell the family home until they return to live in Australia and pay a lesser amount of income tax on the capital gain accrued while living overseas.
- Do not accept the employment opportunity being offered overseas or do not consider retirement in an overseas country. In other words, stay in Australia and claim the main residence exemption just like everyone else.
- Sell the main residence if contemplating living in another country in retirement or leaving the family home to a non-resident beneficiary.

One major concern about the proposed CGT amendments is that there will be Australian citizens living in another country that have a main residence in Australia that is rented, and these citizens have no knowledge of these changes to the main residence exemption. They may be living in their country of birth having retired from employment in Australia and they decide to sell the former family home, or they pass away leaving the main residence to a

[39] CPA Australia, above n 2.
[40] Ibid.

relative still living in Australia. How are these citizens of Australia but non-residents for taxation purposes going to be informed about these CGT amendments? They may no longer having a professional relationship with their accountant or lawyer in Australia. Consideration must be taken of this situation and the Australian government or the ATO should try to inform as many former residents of Australia of the CGT amendments.

VII. CONCLUSION

In some cases, Australians need to live and work overseas for employment opportunities or for their career enhancement or even to maintain their employment if transferred by their employer. The consequences of changing residence mean that the family home, the main residence will be subject to income tax on the capital gain if sold while the owner lives overseas as a non-resident of Australia for taxation purposes. Home owners faced with paying income tax on the family home may be deterred from working and living overseas. This paper has reviewed the consequences that flow from this proposed law and what this means for Australians wanting to work in another country. Moreover, there are serious consequences for Australian non-residents currently living in retirement overseas who may have retained their main residence in Australia and are totally unaware of the proposed changes to the CGT provisions. All lawyers and accountants must be aware of these proposed amendments if involved in estate planning due to the consequences of leaving a main residence to a non-resident beneficiary. The paper has also make recommendations on how the proposed law may be amended so that Australian residents who own their own family home may avoid paying income tax on a capital gain that is exempt for every other Australian who maintains their Australian residency.

A further concern of this proposed amendment to the CGT provisions relating to the main residence is that it could be the precursor to other CGT amendments effecting the family home.