

AUSTRALIAN TAX ADVISER

The IFX Legal Tax Team

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SECTION 1 – PROFESSIONAL DEVELOPMENTS

RESIDENCY TESTS FOR INDIVIDUALS REVISITED

[Taxation Ruling TR 2023/1](#) consolidates and updates the ATO's views expressed in **IT 2650** (permanent place of abode outside Australia), **IT 2681** (residency status of business migrants) and **TR 98/17** (residency status of individuals entering Australia).

The Ruling was released on 7 June 2023, and outlines the ATO's interpretation of the tax residency rules for individuals set out in s 6(1) of the ITAA36. Income Tax Ruling **IT 2650** and Taxation Ruling **TR 98/17** were withdrawn when TR 2023/1 was issued in draft form and Income Tax Ruling **IT 2681** was later withdrawn on 6 June 2023. This Ruling replaces [Draft Ruling TR 2022/D2](#) that was issued for public comment on 6 October 2022.

The Ruling follows some significant cases on residency that have been decided since the release of the withdrawn rulings including *Harding v FCT*¹, *Pike*² and *Addy*³ all of which are covered in TR 2023/1.

In *Harding's* case for example, the taxpayer was found not to be a resident of Australia despite an extended period of physical presence, since she was found not to have an Australian domicile. Before this case, there had been some uncertainty about whether the term 'permanent place of abode' should be given a broad or narrow interpretation. The Court held that 'permanent place of abode' was not limited to an individual dwelling or dwellings and could instead refer, more broadly, to a city or country.

Unfortunately, the ruling is silent on the proposed changes to the residency tests, announced by the previous Government in the May 2021 Budget (in response to the Board of Taxation report). The Board had recommended a 'bright line' test, which the current residency tests lack.

The changes proposed in the report were that a person who was physically present in Australia for 183 days or more in any income year would automatically be an Australian tax resident. For anyone who did not meet the primary test, there would be secondary tests that examined a combination of factors including physical presence and other measurable, objective criteria.

As things currently stand, an individual will be a tax resident of Australia if **any** of the following alternative tests in the s 6(1) definition of 'resident of Australia' is met:

1. **the ordinary concepts test** – an individual will be a resident of Australia if they reside here according to ordinary concepts. This test is based on the wording in the definition, which includes a person 'who resides in Australia' in the preamble portion of the definition
2. **the domicile test** – an individual is considered to be a resident if they are domiciled in Australia, (unless the ATO is satisfied that the person's permanent place of abode is outside Australia)

¹ [2019] FCAFC 29

² [2020] FCAFC 158

³ [2020] FCAFC 135