



THE TAX INSTITUTE

5 March 2020

Corporate tax residency review
Board of Taxation, Secretariat
C/-The Treasury
Langton Crescent
Parkes ACT 2600

By email: CorporateResidency@taxboard.gov.au

Dear Sir/Madam,

Board of Taxation - Corporate tax residency review - options paper

The Tax Institute welcomes the opportunity to make a submission to the Board of Taxation in relation to the paper released in December 2019 and entitled Corporate tax residency – Options Paper (**Options Paper**).

The Tax Institute considers that there is an unacceptable level of uncertainty in relation to Australia's corporate tax residency rules. This uncertainty has arisen primarily as a result of the response by the Commissioner of Taxation (**Commissioner**) to the High Court's decision in *Bywater Investments Ltd v Federal Commissioner of Taxation; Hua Wang Bank Berhad v Federal Commissioner of Taxation* [2016] HCA 45 (**Bywater**). The Commissioner's position is set out in Taxation Ruling TR 2018/5 Income tax: central management and control test of residency (**TR 2018/5**) and Practical Compliance Guideline PCG 2018/9 Central management and control test of residency: identifying where a company's central management and control is located (**PCG 2018/9**).

The Institute considers that this uncertainty cannot be resolved by further guidance material. The Institute considers that a legislative solution is required to resolve the uncertainty. In relation to the proposed solution, the Institute considers that there are two broad options:

1. Modification of the central management and control (**CMAC**) test to ensure that having CMAC in Australian cannot, by itself, be taken to also constitute carrying on business in Australia for tax residency purposes. That is, a modification which legislatively reinstates the position as set out in former tax ruling TR 2004/15 where the residency test is applied in two steps.
2. Introducing an incorporation only test of residency.

In relation to these options, our members can see that there are benefits and issues with both proposed solutions. The Institute considers that the submission prepared by the Law Council of Australia (**LCA Submission**, see Annexure A) accurately summarises the views of our members. Therefore, the Institute endorses the LCA Submission.

In addition to the points raised in the LCA Submission, the Institute would like to note that if the incorporation model is introduced, extensive consultation and consideration would be required as this would represent a significant change to the tax system. Transitional provisions would also require detailed consultation and consideration.

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Angie Ananda, on 02 8223 0050.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Peter Godber', with a long horizontal flourish extending to the right.

Peter Godber
President

ANNEXURE A

LCA SUBMISSION



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