International Wealth Structuring and Estate Planning

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PRÉCIS

- Pre planning – income & inheritance tax issues for:
    - Incoming residents
    - Outgoing residents
    - Outgoing investors
- Use of companies & trusts in low tax jurisdictions
- The problems and challenges when you fail to plan effectively
- Recent legislative developments in UK and elsewhere, and recent cases

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INTRODUCTION

The financially more wealthy a person, the more likely it will be that the holding of assets will be more complicated, and in more than one jurisdiction[2]. This may be driven by a number of factors, such as taxation (direct and inheritance), forced heirship or testators family maintenance legislation, asset protection concerns, including liability under family law and bankruptcy legislation, as well as the need to spread wealth between more than one country, to avoid having "all eggs in one basket", thereby assisting with sovereign risk and currency risk.

Estate planning for some wealthy Australians may involve becoming a non-resident of Australia for tax purposes. Conversely, estate planning for residents of countries with inheritance tax e.g. the UK, may involve wealthy Britons first becoming temporary tax residents of Australia, and eventually adopting a domicile of choice in Australia. This does not require them to renounce citizenship of the UK, unlike perhaps, the US.

The conclusion is that due to developments in the law of bankruptcy, and family law in Australia, the use of *inter vivos* trusts with independent trustees will become more widespread, and the use of such trustees in suitable offshore jurisdictions, an expected response. An offshore trust may be used whether the Australian individual intends to cease to be an Australian resident or not.

Offshore trusts may also be very useful for residents of civil law countries that recognize trusts e.g. Italy, although the law is much less settled[3].

MINIMIZATION OF ESTATE DUTIES – ESTATE PLANNING

Generally speaking, as only individuals die, estate & inheritance taxes are usually sought to be overcome by "foreigners" holding assets in the estate & inheritance tax jurisdiction, in "foreign

[2] This paper seeks to deal more with issues of planning by wealthier individuals, rather than simply the technical rules that apply to particular asset classes, which are invariably covered in standard texts in this area: Dicey Morris, and Collins "The Conflict of Laws" 14th ed Sweet & Maxwell, London (2006) Ch 22
Nygh and Davies, "Conflict of Laws in Australia", 7th ed. Lexis Nexis Butterworths (2002) Ch 31.

[3] As the law of Italy is not so readily available in Australia, in English, commentary on it in this paper, should be especially checked with Italian advisors.

entities", such as companies and trusts[4], which may either exist in perpetuity as with companies, or for trusts, subject to a rule against perpetuities and accumulations, where the perpetuity period may span several or more generations[5].

For "locals", as estate & inheritance taxes are normally supported by gift duties, which invariably have an annual *de minimus*, taxpayers are likely to give away as often as they can below those thresholds, and as there is usually a "clawback" within no less than three years of death, to try and start gifting as early as possible. Of course, the ultimate planning for those subject to estate & inheritance taxes, is to lose the nexus with that country e.g. UK domiciles adopting a domicile in a country without such taxes, like Australia.

RISK OF ESTATE DUTIES' APPLICATION

DOMICILE, NATIONALITY & FORCED HEIRSHIP

In most common law countries, such as Australia, it is the domicile[6] of a deceased that determines the testamentary law to apply to that deceased estate.

Most civil law countries have since Napoleonic times, adopted nationality as a test to determine the testamentary law to apply to a deceased estate of a national of a civil law country. States of the USA, have adopted a form of domicile more akin to "habitual abode".

In most civil law countries and Islamic countries the testator is not entirely free to exercise testamentary power as he sees fit i.e. "forced heirship".

The Ango-Australian concept of domicile is still largely governed by the common law (e,g. *Udny v Udny* (1869) LR 1 HL 441; [L. R.] 1 Sc.&Div. 441), although in both Australia, and the UK (*Domicile and Matrimonial Proceedings Act 1973*), there are statutory amendments dealing with the domicile of married women and the domicile of dependent children[7]. Section 10 of the Australian *Domicile Act 1982* codifies the common law to a certain extent, in that it provides:

> "The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country."

Of course, in order to change one's domicile of choice to Australia, it would be generally necessary to have the legal capacity through visa status to "make his home indefinitely" or "ends one's days"[8] in Australia[9]. This would require the taxpayer to convert to permanent

[4] Or civil law entities such as foundations.

[5] Note that the rule against perpetuities has only been abolished in South Australia. Several offshore jurisdictions have abolished the rule against perpetuities and accumulations e.g. Jersey, Cayman, and Labuan, Malaysia (from 11 Feb 2010).

[6] Dicey Morris, and Collins "The Conflict of Laws" 14th ed Sweet & Maxwell, London (2006) Ch 6
Also see generally Nygh and Davies, "Conflict of Laws in Australia", 7th ed. Lexis Nexis Butterworths (2002)

[7] In the UK, there has been since 1964, various law reform reports in relation to the concept of domicile, but they have largely only been implemented to deal with the most inappropriate of outcomes from the use of the test.

[8] Or "until the end of his days unless and until something happens to make him change his mind": *IRC v Bullock* [1976] STC 409 at 415.

resident status, in the case of a UK domicile, at least 3 years before the date of death in order to avoid UK Inheritance Tax on world-wide assets: s267(1)(a) *Inheritance Tax Act 1984* (IHTA).

A British person may find it easier to have evidence accepted of his acquisition of a domicile of choice in Australia rather than a country which is more alien in terms of language, culture, religion etc, although it is always a question of fact[10].

If the country of domicile of the deceased has an estate or inheritance tax, and/or lifetime gift duties, the determination of domicile will have significant tax implications, as most countries which have an inheritance tax, tax persons domiciled (or deemed domiciled) in their jurisdiction, to inheritance tax on their world-wide assets, but only tax non-domiciled persons on their assets within the jurisdiction.

Australia abolished State and Federal Death and Gift Duties in the around 1980. Australia is now one of only six[11] or so of the 34 OECD countries without death duties[12].

Whilst a person may be a resident of two (or even more) countries at the same time, a person can only have one domicile[13].

There are essentially three types of domicile - the domicile of origin, the domicile of choice and the domicile of dependency.

Basically, the domicile of origin of an individual is the domicile of the father at the date of birth (or the mother if the child is illegitimate). Once the individual turns 18, he or she is able to change his domicile to a domicile of choice, but the cases indicate that this is much more difficult that merely changing tax residence: see most recently, *Gains-Cooper v HMRC* [2006] UKSPC 00568 before the Special Commissioners in the UK.

In order for an individual to acquire a domicile of choice there must be both the act and the intention to select a new jurisdiction as that individual's permanent home. HMRC has shown continual resistance to claims of loss of UK domicile of origin[14].

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[9] Although see most recently *Mark v Mark* [2005] 3 All ER 912, which casts some doubt on the status of *Solomon v Solomon* (1912) WNNSW 68, and *Puttick v A-G* [1979] 3 All ER 463.

[10] As can be seen in *Casdagli v Casdagli* [1919] AC 145 at 156-157 and *Qureshi v Qureshi* [1971] 1 All ER 325 at 339-340.

[11] Apparently the others are Austria, Canada, Estonia, Israel, Mexico & Sweden.

[12] The Australian Greens advocated the reintroduction of death duties for estates over $5M, item 23 economic policy (also see The Australian 11 Sept 2010), as do ACOSS, however, before the most recent election they apparently abandoned that policy: per Sydney Morning Herald 27 Dec 2012.

[13] *Udny v Udny* [L. R.] 1 Sc.&Div. 441 at 448.

[14] see *IRC v Bullock*; *Re Clore (deceased)(No2), Official Solicitor v Clore & Ors* [1984] STC 609; *Anderson v IRC* [1998] STC (SCD) 43; *F v IRC* [2000] STC (SCD) 1; *Civil Engineer v IRC* [2002] STC (SCD) 72; *Moore's exec v IRC* [2002] STC (SCD) 463; *Surveyor v IRC* [2002] STC 501. For a case where there was a dispute between Australian and UK resident potential beneficiaries of the estate of the English born playwright, Anthony Shaffer, as to whether he had a domicile of choice in Queensland, see *Morgan & Anor v Cilento & Ors* [2004] EWHC 188 (Ch).

During a person's life, they may have caused to be formed entities onshore or offshore, in which they do not have an ownership interest e.g. a discretionary trust, over which they have a degree of influence (usually by retaining the power of appointment over the trustee, and/or a memorandum of wishes), but which is not property, and so not able to be bequeathed by will or transmitted on intestacy**.**

Persons who will be the subject of forced heirship, may wish to avoid that result by making an *inter vivos* settlement in a country which has common law trusts. There is even forced heirship within the UK, in Scotland, in Canada in Quebec, and in the US, in Louisianna. There is also forced heirship in Japan. The case of *Abdel Rahman v. Chase Bank (CI) Trust Company Limited,* a decision of the Jersey Royal Court reported at [1991] JLR 103, involved the challenge to a Jersey trust by the wife of a Lebanese husband settlor. Civil law countries that are parties to the Hague Convention On The Law Applicable To Trusts And On Their Recognition (1989) will then need to recognize such a trust, but there may be issues as to whether the distribution by the deceased during his or her life, can be "clawed back". Often the forced heirship laws will attempt to do so if the deceased has gifted the property within a specified period before death[15].

NATURE OF ESTATE DUTIES

Introduction

Very generally speaking, an estate tax is on the estate of the deceased, whereas an inheritance tax (IHT) is on the beneficiary. The UK & US have estate taxes[16], whereas France and Italy have inheritance taxes. Gift taxes are usually a back-up to prevent during lifetime gifts being used to escape estate & inheritance taxes[17].

UK world-wide IHT is based on UK domicile or deemed domicile. Other countries use various combinations, or one of, residence, ordinary residence, nationality[18] or domicile, as the test for their world-wide IHT. Due to the potential for double taxation, the OECD has a *Model Double Taxation Convention on Estates and Inheritances and on Gifts* (1982). It contains a tie breaker to resolve different national rules relating to "fiscal domicile". For instance, the UK has entered into 10 estate tax treaties[19].

[15] 10 years in Germany & France. In Latin America, the only country which does not have forced heirship is Panama, where it should be noted, the Panamanian private – interest foundation law rejects the enforcement of foreign order of forced heirship: see Nicolas Malumian, "Recognition of foreign trusts", STEP Journal, June 2010.

[16] Even though the UK legislation is termed Inheritance Tax Act 1984 & the estate tax referred to as inheritance tax (IHT).

[17] New Zealand retained its gift duty after abolition of its death duty, but the gift duty was repealed effective 1 October 2011.

[18] Austria, Germany, The Netherlands & Sweden.

[19] See generally, "Inheritance and Wealth Tax Aspects of Emigration and Immigration of Individuals", 56th IFA Congress, Oslo (2002) Seminar A; "Death as a taxable event and its international ramifications" 64th IFA Congress, Rome (2010) Cahiers Vol 95b.

Generally speaking, as only individuals die, foreign inheritance taxes have historically been overcome by holding assets in "entities", such as companies and trusts.

The French, have recently enacted law to attack such tax planning. The British have announced far reaching changes, but only in relation to UK residential property.

UK Estate & Gift Tax

Non-domiciles of the UK, who reside in the UK for 17 out of 20 years before their demise, are deemed domiciles, subject to UK IHT on their world-wide property[20]. The concept of deemed domicile is only relevant to IHT, and not to income or capital gains tax.

Main residences are not exempt from IHT, even though they are for UK CGT. Business assets[21] are excluded as is agricultural property[22].

Non-domiciles of the UK, who reside in the UK for less than 17 out of 20 years before their demise, are subject to UK inheritance tax (IHT) only on their UK *situs* property.

The threshold value of a net estate[23] to become liable to IHT for 2014-15 is £325,000 (the so-called "nil rate band"). For estates over the threshold, the IHT is at a flat 40% rate! Transfer from domiciled (or deemed) domiciled, spouse to domiciled (or deemed) domiciled spouse[24], or civil law partner to civil law partner is exempt from IHT[25]. However on the demise of the later spouse or civil law partner, the second estate is subject to IHT. The threshold for IHT on the second estate is £650,000 for 2014-15.

An Australian tax resident non-UK-domicile, who has UK *situs* property (with certain exemptions mainly for government bonds) will pay IHT on that property.

To prevent avoidance of IHT by emigrating near death, there is a provision deeming domicile if the deceased dies within 3 years of being domiciled in the UK[26].

To back up the IHT regime on death, the IHTA also deals with gifts while alive, to non-spouse or non-civil law partners. Gifts to non-spouse or non-civil law partners who are individuals totaling

[20] s 267(1)(b) IHTA
[21] s104 IHTA
[22] s116 IHTA
[23] Debt secured over assets other than Excluded Assets is taken into account in calculating the value of the net estate: s5(3) & 162(5) IHTA.
[24] As of April 2013, transfers from UK domiciled spouses (or civil partners) to non-UK domiciled spouses (or civil partners) are exempt up to the "nil rate band": s178 of the *Finance Act 2013*, which amends s18 of the IHTA. Also, non-UK domiciled spouses (or civil partners) can elect to be treated as UK domiciled, thus enabling them to access the full spousal exemption. However, such an election makes non-UK domiciled spouses' (or civil partners') entire estates subject to inheritance tax. An election is irrevocable, however it will cease to have effect if the electing individual is not an income tax resident for four successive tax years: s177 of *Finance Act 2013*, which amends s267 and introduces ss267 ZA and 267 ZB of the IHTA.
[25] s18 IHTA
[26] s267(1)(a) IHTA

up the "nil rate band" can be made while alive, in any 7 year period, without being added back into the value of the deceased estate. Such gifts over the "nil rate band" may still fall outside the IHT net, as long as the donor lives for 7 years after making the gift (a so called "potentially exempt transfers" - PETs)[27]. If the donor dies between 3 and 7 years after making the PET, the IHT liability shades out. Gifts over the "nil rate band" to trusts in the UK or outside the UK, are usually not PETs, and will make the gift liable to an immediate 20% IHT liability[28].

Debt secured over assets other than Excluded Assets is taken into account in calculating the value of the net estate: s5(3) & 162(5) IHTA. The debt can either be from financial institutions or related non-resident individuals or entities, to reduce the value of the UK *situs* estate subject to IHT.

As noted above, inheritance taxes have been sought to be avoided by non-domiciles holding assets in foreign companies or trusts (known in the UK as "enveloped entities"). In response to this strategy, but without changing the inheritance tax *per se*, the UK Government has introduced a series of measures in recent years in relation to "non-natural persons" (e.g. companies, but not trusts) purchasing, holding and disposing of residential properties[29]:

- From March 2012, Stamp Duty Land Tax (SDLT) was increased from 7% to 15% on purchases of residential property worth over £2 million. From March 2014, the threshold for SDLT is proposed to be reduced to £500,000;
- From April 2013, Annual Tax on Enveloped Dwellings (ATED - dubbed the "Mansions Tax") was introduced based on a scale such that for properties worth between £2 and 5 million, the charge is £15,000, and the top levy at £140,000 for properties worth over £20 million.[30] The threshold for ATED is proposed to be gradually reduced to £500,000 from April 2016;[31]
- From April 2013, Capital Gains Tax (CGT) of 28% upon disposal of such properties was introduced. The threshold for CGT is proposed to be gradually reduced to £500,000 from April 2016.[32]

In addition to the above, the UK Government released a consultation paper in March 2014 regarding its proposal to extend the application of CGT on UK residential properties to all non-UK residents, including individuals, companies and trusts, as from April 2015.[33]

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[27] s 3A IHTA

[28] The gift tax is generally payable by the donee, within 6 to 12 months of the gift, depending on when the gift is made. For gifted land & buildings, it may be payable over 10 years.

[29] "Changes to the Taxation of High Value UK Residential Property Held by Certain Non-Natural Persons"; HM Revenue & Customs; 2014.

[30] For properties worth between £ 5 million-10 million, the charge is £35,000; for properties worth between £10-20 million, the charge is £70,000.

[31] From April 2015, properties worth between £1 to 2 million are proposed to be liable for a charge of £7,000. From April 2016, properties worth between £0.5 to 1 million are proposed to be liable for a charge of £3,500.

[32] The application will be phased in on the same basis as the ATED. CGT will only apply to that part of the gain that is accrued on or after the introduction of the relevant band.

These measures make it much less attractive to hold UK residential property in a foreign company. Offshore trusts are not much better either for holding UK residential property, because the trust may be charged with UK inheritance tax on each ten year anniversary of the settlement or upon the property leaving the trust at a rate of up to 6% of the value of the property.[34]

This will increase the attractiveness of such properties being owned by natural persons, or trustees of offshore settlements, but purchased with borrowings secured over the property, to reduce the value of the UK *situs* estate subject to IHT. Nominees can be used to maintain anonymity. Other UK real estate and other taxable assets are not affected.

US Estate & Gift Tax

The position for calendar 2014 is that the top rate of estate & gift tax is 40% with a threshold of US$5.34M (for citizens & domiciliares). However, 19 States and the District of Columbia impose their own estate or inheritance tax in addition to the Federal estate tax[35]. In general, credit against Federal estate tax is also given for any corresponding State tax to avoid double taxation[36].

US citizens and domiciliaries are subject to Federal estate tax on their world-wide estates. Non-citizens and non-domiciliaries are only subject to estate tax on their US *situs* assets, and the threshold for them is only US$60,000.

Domicile for US purposes has been described[37] as like "habitual abode", in contrast to tax residence, which is a more formulistic test of counting days in the US. US domicile is essentially living in the US with an intent to remain in the US indefinitely i.e. a very subjective test. However, the holding of a "green card" (or resident alien status) would be one of the facts & circumstances which would be relevant.

A US domicile will not be lost until a new domicile has been established[38], and absent a relevant treaty, the person may be exposed to US and another country's estate tax due to different rules in each.

To avoid a loss of estate tax by passing assets to grandchildren rather than children, there is a back-up Generation Skipping Tax (confusingly for us "GST").

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[33] The consultation paper is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298759/CGT_non-residents_condoc.pdf.

[34] ss64 and 65 of the IHTA .

[35] "States You Shouldn't Be Caught Dead In", Wall Street Journal, 25 October 2013.

[36] IRS Code § 2011(a).

[37] Dicey Morris, and Collins "The Conflict of Laws" 14th ed Sweet & Maxwell, London (2006) at [6-133].

[38] As to new exit rules for losing that status to avoid income and inheritance tax, see: "Winners and losers", G Warren Whitaker, STEP Journal Sept 2008; "Expatriation: time to go", Paul A Sczudlo, STEP USA, Oct 2008; "Giving up US citizenship – at what cost?", Marshall Langer, Offshore Investment, Dec 2009/Jan 2010.

US *situs* property includes US real estate, tangible property physically located in the US, and equity interests in US entities, but generally not US bank accounts or debt securities.

Accordingly, planning for non-citizens and non-domiciliaries involves holding US *situs* property in foreign entities. Where such a person is moving to the US, consideration should be given to a pre-immigration trust owning the foreign entity to own the US *situs* property. Unlike the UK, non-domiciliaries can only deduct debt in determining the value of their net US *situs* estate, limited in proportion of their US assets to their world-wide assets.

FRANCE

Inheritance and Gift Tax

Tax is not imposed on the donor, or on the estate of the deceased, but on each beneficiary in respect of what that beneficiary receives.

Tax is due on worldwide assets when either the deceased or the beneficiary is a tax resident of France, but only on French assets when both the deceased and the beneficiary are resident outside France.

The rate of taxation is dictated by the degree of relationship to the deceased[39]. Since 2007 there has been no inheritance tax between man and wife, or between those in a French civil partnership. A child is taxed at rates ranging from 5 per cent, to 45 per cent (from 31 July 2011 for € 1,805,677 & over), collateral relations are taxed at rates ranging from 35 per cent to 45 per cent, while for unrelated beneficiaries the rate is 60 per cent.

Although, as a general rule, gift tax is due at the same rates as inheritance tax, but does apply to gifts between husband and wife and those in a French civil partnership. It was reduced by 50 per cent when the donor was less than 70 years old and by 30 per cent when the donor was at least 70 years, but under 80 years old, although those concessions were reduced in 2011.

“Resident” in France for a deceased means he had his main home in France; or

- if France is the place where he performs his principal professional activities; or
- if France is the centre of his economic interests; or
- spent more than 183 days a year in France.

“Resident” in France for a beneficiary means “resident” as above for at least 6 out of the 10 years preceding death of the deceased.

[39] The election of a socialist President in 2012 led to increases in taxes, including the hiking of the top marginal income tax rate to 75%. Thresholds were also reduced e.g. the 5% starting rate for inheritance tax was reduced from €159,329 to €100,000 for children from 17 August 2012.

Wealth tax

This tax is payable by all individuals whose assets exceed a certain value on 1 January of each year (€800,000 from 1 January 2012, down from €1,300,000 on 1 January 2011), reflecting the change to a socialist President.

For a French resident, the world-wide assets are taken into consideration. A non-resident, however, is subject only to wealth tax on French assets.

However, since 1 January 2008, for a person who becomes a French resident after that date, for the first five years of residence, there is an exclusion of foreign assets

French assets include, among others, real property situated in France, shares in property investment companies, debts owed by debtors established in France and personal property situated in France.

Debts relating to the estate subject to wealth tax are allowed as deductions in determining the tax base. However, from 1 January 2012 the value of shares in French property investment companies (SCI) cannot take into account debt owed to shareholders, which was a common way to reduce wealth tax for non-residents.

Business assets and 25% or more participations in trading companies are exempt.

Financial investments by non-residents are expressly exempt from wealth tax.

The rates of wealth tax now vary from 0.55 per cent (from worth of €800,000) to 1.8% per cent (from worth of €16.79M).

FRENCH FIGHTBACK

The concept of the trust has recently been addressed in relation to French tax, and is viewed with deep suspicion by the French authorities as a vehicle for tax avoidance. Trusts with a French connection must file disclosures with the authority, failing which there is a penalty of €20,000 or 12.5% of the trust assets, whichever is the greater.

In as much as it relates to a non-resident settlor, where the beneficiaries are also non-resident, the French inheritance, gift & wealth taxes can apply to such a trust with non-resident trustee holding French *situs* property, for instance, on the death of the settlor, inheritance tax is from 2011, payable where the trustee is resident in a "non-cooperative State"[40]. Also, in relation to wealth tax, the non-resident trustee holding French *situs* property will have an annual liability of 1.5% of the market value of the relevant assets.

[40] Being one which has not entered into an exchange information sharing treaty.

Italian Inheritance & Gift Tax

Inheritance and gift tax were reintroduced in Italy on 24 Nov 2006 (having been abolished in 2001). For Italian residents, IHT applies on a world-wide basis, whereas for non-residents, IHT only applies to Italian *situs* assets. The applicable rates depend on the relationship between the deceased (or donor) and the beneficiary:

- Spouse, or descendant or ascendant, 4% only on asset value exceeding €1,000,000 for each beneficiary
- Brother or sister, 6% only on asset value exceeding €100,000 for each beneficiary
- Other relatives, including in-laws, 6%, but no thresholds
- Others, 8%, and no thresholds
- Where the Estate or part of the Estate devolves to one or more disabled children, the exempt amount is increased to €1,500,000
- Where the Estate includes a business or a substantial shareholding in a company, whatever the amount, these are not taxed if they pass to the children of the deceased and if the children undertake to continue the business or control the company for at least five years.

It has been noted[41] that the tax authorities view that gift tax was payable on settlement of a trust, rather than when the trust vests the property on beneficiaries, has not found favour with the courts in a number of recent cases. The most relevant for present purposes, was a decision of the Commissione Tributaria Provinciale of Florence n.30 on 12 Feb 2009.

Compared to the UK, the rates in Italy are sufficiently low, that only the most motivated would cease Italian residence for IHT reasons alone. However, combined with forced heirship applicable to Italian nationals, and taxation issues[42], the picture may change.

FORCED HEIRSHIP & COMMUNITY PROPERTY

Italian Forced Heirship

The law applicable to succession in Italy is the law of nationality of the deceased, with the exception that the deceased can indicate in a will as the governing law of succession, the law of the country where the deceased is resident, if at the time of death, the deceased still resides in the country of the chosen law[43].

[41] Emiliano Rossi, "The application of inheritance and gift tax to trusts: the Italian tax courts rule against the opinion of the tax authorities", Vol 8, Issue 3 TQR (2010).

[42] STEP Directory and Yearbook 2014 says: "For tax purposes, individuals are deemed to be resident in Italy if, for the greater part of the fiscal year (183 days, 184 in leap years), they are registered as resident or are domiciled in Italy… Pursuant to the *Civil Code*, domicile is the place where individuals establish the centre of their affairs and interests, while residence is the place where one usually lives. Italian nationals who change their residence to tax-friendly countries are treated as tax-residents for tax purposes, unless they prove that they have effectively emigrated to the tax-friendly country."

[43] Articles 456 to 564 of the Civil Code

Under Italian succession law certain members of the family - "forced heirs" - are automatically entitled to a share of the deceased's assets at the time of death. This compulsory share or forced heirship is called *legittima*.

Minimum Statutory Share: If A Person Dies Leaving -

Only one child and no spouse: to the child 1/2 of the Estate

Two or more children but no spouse: To the children in equal shares a total of 2 / 3 of the Estate

One or more "*Ascendenti*" (generally parents) but no spouse and no children: 1/3 of the Estate

Only a surviving spouse: 1/2 of the Estate

A surviving spouse and a child: to the surviving spouse 1/3 of the Estate to the child 1/3 of the Estate

A surviving spouse and children: to the spouse 1/4 of the Estate to the children in equal shares a total of 1/2 of the Estate

A surviving spouse and "*Ascendenti*" but no children: to the spouse 1/2 of the Estate to the "*Ascendenti*" 1/4 of the Estate

Thus it can be seen that even through a will, at least ¼ of an Italian estate can be left at the testator's discretion. Gifts given during the deceased's life time may risk being "clawed back" if the "forced heirs" make a claim, but obviously, the practical success of such a claim may depend on who the gift was made to, and whether the property is in Italy.

Community Property

It has been observed[44] that throughout Latin America and continental Europe, and in nine US states, marriage will, as a general rule, convey joint property rights on the spouse. As Italy largely taxes income according to ownership, the existence of community property is quite different to the position in Australia and Britain, where marriage does not affect ownership, at least until the exercise of rights on relationship breakdown. The significance of community property, is that a donor to an *inter vivos* trust may not have title to settle on a trust. This issue is blocked by specific legislation in several tax havens[45]. It should be noted that forced heirship

[44] Jennifer Wioncek, "Handling community property laws in international tax and estate planning", Vol 8, Issue 3 TQR (2010). She then analyses the US tax position particularly focusing on the fact that US tax will usually follow ownership.

[45] See the discussion of the Cayman Island decision in *Lemnos v Coutt & Co* 1992-93 CILR 460 (CA) especially Kerr JA at 506, as reported by Sean McWeeney, "The effectiveness of statutory provisions outlawing forced heirship claims", 10th Annual STEP Caribbean Conference , Panama, May 5-7, 2008, pp 8-10. However, as observed by Mark Hicken & Elaine Reynolds, "Trusts and the Conflict of Laws", Continuing Legal Education Society of British Columbia, April 2006 at pp11-13, US cases such as *FTC v Affordable Media LLC* 179 F. 3d 1228 (9th Cir., 1999) and *In re Stephen J Lawrence* 279 F. 3d 1294 (11th Cir.,

jurisdictions may notionally take into account amounts transferred to defeat forced heirship claims, by giving a greater shares of the domestic estate to such claimants, than would otherwise be the case[46].

Islamic Forced Heirship

Islam law requires two-thirds of the deceased's estate to be distributed to heirs under Islamic law. The testator is free to leave one-third of the estate pursuant to a will, including to non-Muslims[47].

However, there is no stipulation as to whom property may be gifted *inter vivos*, save that the gift must be outright, as gifts with reservation of rights to the donor may be treated as remaining within the deceased's estate. Subject to the donor's view, the donor may settle property on an *inter vivos* common law trust, with the only proviso from an Islamic perspective, that the donor has made the gift outright.

ASIA

In contrast to the US, UK, and many European countries, inheritance & gift taxes are now relatively uncommon in Asia, having been abolished in countries which formerly had them. For instance, there are currently no such taxes in India[48], China[49], Hong Kong SAR[50], Malaysia[51] & Singapore[52].

COMPANIES

Shares in a company formed under the law of the country where the assets are to be situated is less likely to avoid the local IHT, as the shares are themselves likely to be treated as local *situs* property.

In recent times, due particularly to a high Australian dollar, and a slump in US real estate prices, a lot of Australian resident individuals have had marketing addressed to them for US real estate

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2002), achieve enfocement by incarcerating the settlor as being in contempt, until he complies with the court's order.

[46] McWeeney *id* pages 16-17.

[47] See generally, "Islam: its law and society", Jamila Hussain, 2nd ed. Federation Press, Sydney (2004) Ch 9; & "Shari'a succession", Gary Envis, STEP Journal, Sept 2008. *Ghafoor & Ors v Cliff & Ors* [2006] EWHC 825 (Ch) is an English case on touched on Islamic forced heirship in Pakistan. *Murakami v Wryadi* (2006) NSWSC 1354 is an Australian case which touched upon Islamic forced heirship in Indonesia.

[48] Abolished in 1985, although there have been reports of it being reintroduced: Shroff et al; *Budget 2013:* "Will India's Proposed Inheritance Tax be a 'Heir' Raising Experience?", The Economic Times; 28 February 2013; http://economictimes.indiatimes.com/opinion/guest-writer/budget-2013-will-indias-proposed-inheritance-tax-be-a-heir-raising-experience/articleshow/18724359.cms.

[49] There have been reports of inheritance tax being introduced: Song; "China's Proposed Inheritance Tax Meets With Widespread Disapproval",; International Business Times; 1 October 2013; http://www.ibtimes.com/chinas-proposed-inheritance-tax-meets-widespread-disapproval-1413240.

[50] abolished 11 Feb 2006.

[51] abolished 1 Nov 1991.

[52] abolished 15 Feb 2008.

e.g. apartments in Florida. Agents often seem to suggest ownership through an US LLC, which seems to leave an Australian resident individual exposed to US inheritance tax on his membership interest in the LLC (if held personally), as the threshold for non-citizen non-domiciliaries is only US$60,000.

Ownership of US realty through an Australian resident unit trust might be preferred.

An Australian resident company might be used for investment in assets in countries with estate & inheritance tax, but this may not be possible due to local requirements, or it may not be ideal from an asset protection standpoint.

It may be that the foreign company should be formed and resident outside Australia and the investee country e.g a tax haven.

Residence of companies

The law in Australia has not yet referred to the jurisprudential developments in the UK on the central management and control of companies.

The test of residence for companies often depends upon the place of management of the company and/or the place of incorporation of the company.

The United Kingdom and Australia are examples (there are many), of countries which now determine corporate tax residence on the alternative bases of:

(a) place of incorporation; or
(b) place of "central management and control".

Malaysia determines corporate residence solely on the basis of "central management and control". In contrast, the United States simply looks to the place of incorporation[53].

The classic general law "central management and control" test, which until 1988 was the sole test of company residence in the United Kingdom[54], was set out in the speech of Lord Loreburn in *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455. Also see *Unit Construction Co Ltd v. Bullock* [1959] 3 All ER 831.

As can be seen from *Swedish Central Railway Co v. Thompson* [1925] AC 495, the central management and control of a company can be shared between two countries, such that the company can under the test, be a dual resident.

More recently, both *Untelrab Ltd v McGregor (Inspector of Taxes)* [1996] STC(SCD) 1 and *R v Dimsey; R v Allen* [2000] QB 744 referred to below, highlight the need to be fastidious in

[53] However, if a Malaysian company is a CFC for US purposes, and its central management and control is exercised in the US, if US persons become involved in day-to-day management, it is more likely to have a fixed place of business in the US, such that its foreign source income may be "effectively connected", to a US "trade or business", and therefore taxed in the US: refer Reg 1.864-7(c).
[54] see SP 1/90

ensuring that the majority of the board for example, of a Malaysia company, is resident in Malaysia, and do in fact meet for the purpose of considering resolutions, rather than that an individual, for example, in the UK, whether a director or not, conduct the Malaysian company's board level decisions, on their own.

In *Wood v Holden (HMIT)* [2006] EWCA Civ 26, the principle was confirmed, that the place where a board of directors exercises its duties (properly), will be the place of its "central management and control" (in that case, The Netherlands), even where the controlling shareholders, or advisers recommend, or even expect the board to reach certain decisions, and those persons are elsewhere (UK). After reviewing the authorities such as the Australian High Court decision in *Esquire Nominees Ltd v FC of T* (1973) 129 CLR 177, Lord Justice Chadwick, with whom the other two members of the court, so held.

The High Court of Australia in *Esquire Nominees* held that a company incorporated on Norfolk Island (then part of Australia but then only taxable on income sourced from the mainland), and all of whose board resided on Norfolk Island, indeed had its central management and control on Norfolk Island, notwithstanding the resolutions for board meetings were prepared in Melbourne by the ultimate shareholders' accountants. This was on the basis that the board meet to consider such resolutions, and it would not have passed them, had they been illegal, or not in the best interests of the company.

In *Untelrab*, the United Kingdom Inland Revenue asserted that the company incorporated in Jersey, with two Bermudian resident directors, and one director resident in Jersey, was nonetheless resident in the UK, where the parent company was resident. The Special Commissioners held that the company was resident in Bermuda and applied *Esquire Nominees*. What is interesting about the case is the depth of analysis of the evidence of the activities of the company over a six year period, including cross examination of the offshore directors.

The Inland Revenue had more success in criminal proceedings in *R v Dimsey*; *R v Allen* where the defendants unsuccessfully appealed their jail sentences for "conspiracy to cheat the public revenue" and "cheating the public revenue" respectively.

The central allegation in those cases was that companies incorporated in Jersey and other havens, and of which Mr Dimsey was a Jersey resident director, were in fact centrally managed and controlled in the UK, such that the companies were liable to UK corporations tax. The evidence accepted by the jury was that Mr Dimsey's client in the UK (Mr Allen), who was not an actual director, was a shadow director, and was in fact actually managing and controlling the companies in respect of board level decisions. The result for the companies was that they were resident in the UK rather than Jersey.

The established principles were applied in UK Tribunal decision in *Laerstate BV v Revenue & Customs* [2009] UKFTT 209 (TC), where a Dutch company was found to be a tax resident of the UK. Again, the case demonstrated the detailed enquiry into the decision making process of directors (and for a period, a "shadow" director). *Esquire Nominees* was again referred to with approval. A somewhat more detailed emphasis was on whether the director who did not own the company had sufficient information before him to be able to make an informed decision.

The most relevant principles to be gleaned from the authorities are:-

(a) Effective management should be where the board of directors regularly meets to decide the policy, conduct and manage the strategic ("high level") decisions necessary for the business, and that each of them have sufficient information for that purpose; and
(b) A majority of the board should be residents of the jurisdiction the company is to be resident of.

The Australian Taxation Office has issued a tax ruling TR2004/15 which confirms these principles, and in addition, confirms (at [50]) that if an Australian resident director participates by telephone or electronically, in a majority foreign board meeting overseas, the fact that the Australian resident is in Australia at the time does not upset the outcome[55].

Whilst the Australian cases haven't yet referred to the recent UK jurisprudence, there have recently been a number of cases where the ATO has challenged the tax residence of foreign incorporated companies.

This has mainly happened in relation to companies which have had also had alleged Australia source income, rather than in situations where the company has been trading only internationally, and so would have only foreign source income. The circumstances were also that the foreign incorporated companies had or were likely to have had Australian resident owners[56]. These cases appear to have flowed out of "Project Wickenby" which originally focused on the activities of the advisory firm known as Strachans, in Jersey & Switzerland, but later expanded to cover activities of a number of Vanuatu advisers (particularly Robert Agius who was with PKF, but is now serving a non-parole 6 years & 8 month sentence in Australia) whose clients used offshore bank accounts and companies incorporated in Vanuatu.

It seems that the reduced scope of Australian CGT from the introduction of Div 855 in 2006 has had some impact on these issues. It now subjects to CGT only Australian real property, and shares or units representing 10% or more of entities which are Australian land-rich, and the business asset held by the Australian "permanent establishment" of a non-resident. This has lead to arguments by the ATO that non-resident companies in non-treaty countries, have been dealing with Australian assets such as shares in non-land-rich companies, on revenue account, so as to be taxable in Australia, whereas a capital gain would no longer be taxable[57].

[55] This is in contrast to the commentators on the UK position, who now all caution against a UK resident director participating other than physically.
[56] Which allowed the ATO to argue that not only was the "central management & control" of the company in Australia (the first test of residency), but also that the company was carrying on business "in Australia" and was owed by residents of Australia (the second test of residency).
[57] In *Re Picton Finance Ltd and FCT* [2013] AATA 116, the taxpayer was a Vanuatu incorporated company (managed by PKF), which conducted share trades in one Australian company listed on the ASX. The Commissioner accepted that the company was not an Australian tax resident, but there are interesting comments in the decision which imply the Commissioner probably should have argued that point, at [86].The taxpayer's share trades were both "on" and "off" market. The AAT found that all trades were on revenue account and the income there from, was Australian sourced. In relation to the "off" market share trades, the evidence showed the transferee signed the share transfer forms in Australia, and that being the place where the contract was entered into, the application of established case law pointed to the source of the profit being Australia, at [82]. In relation to the "on" market share trades, no case law was referred to, but it was held that as those trades on the stock exchange occurred "in Australia", the source

In *Crown Insurance Services Limited and FCT* [2011] AATA 847, the Commissioner asserted that the Vanuatu incorporated taxpayer was in fact a tax resident of Australia, and that in any event, the source of its funeral benefits insurance premium income was Australia[58].

The AAT held that the taxpayer company was a tax resident of Vanuatu (principally as that is where it held its directors' meetings, at [74][59]), and that the source of its income was in Vanuatu (as that was where it conducted its insurance business (contracts were entered into and carried out), at [85][60])).

A Mr Pattenden set up Crown Insurance, and was one of its directors. PKF were not used. He was British born and travelled to Vanuatu and New Zealand (where he had a house), but was an Australian tax resident at the relevant times. The decision does not expressly say who the other directors were, but it is implied there were a majority of directors resident in Vanuatu. The ATO vigorously pursued Mr Pattenden under Project Wickenby, and has come up short[61]. They gave him Departure Prohibition Orders twice, the first was in due course set aside, as referred to in *Pattenden v FCT* [2008] FCA 1590, and the second given illegally soon after the first was quashed, at which time Logan J remarked in an unreported judgment:

> "That sort of scenario I would usually visit, if proved, with a term of imprisonment for the officer concerned and for those who counseled or procured that course".

Source of income

Having failed to establish in the AAT that Crown Insurance was an Australian tax resident, the Commissioner appealed to the Full Federal Court, on the finding that the source of income was Australia. As the case involved a non-treaty resident, there was no need for the income to be derived above the threshold of a "permanent establishment" in Australia, in order for Australia to have the right to tax.

By a majority, the Court held that there was no issue of law: [2012] FCAFC 153. The dissenting judge (Jessup J) held that there was an issue of law, and that the "indirect" source of the income

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of the profit was Australia, at [90]. There is long standing Privy Council authority to this effect: e.g. *CIT Bombay v Chunilal Metha* (1938) L.R. 65 India Appeals 332, cited with approval in *CIR v Hang Seng Bank Ltd* [1991] 1 AC 306.

[58] It is not apparent from the decision, but it appears that it was assumed by all concerned, that such insurance, depending on the death of a nominated party, would have been life assurance (or else Div 15 ITAA 36 would have applied. to deem a part of the premium income to have been subject to tax in Australia. The other possibility is that the death in question was not an event which could only happen in Australia.

[59] Referring only to *Koitaki Para Rubber Estates v FCT* (1941) 64 CLR 241 at 248, which is only one of many that could have been referred to.

[60] Referring only to *Tariff Resinsurances Ltd v C of T* (1938) 59 CLR 194, which was by far the most relevant case.

[61] Indeed, there are press reports that he may be going to sue them for maladministration.

was Australia. The Commissioner was denied special leave to appeal to the High Court on 6 June 2013[62].

The Commissioner clearly wanted to follow through with comments of Jessup J at [94] in the Full Federal Court, to the effect that the indirect source of insurance premium income of a Vanuatu insurer was Australia, on the basis that the "original source" of the premiums was payments made by members of various funds in Australia. This, with the greatest respect, is clearly wrong[63].

Controlled Foreign Companies

A non-resident company controlled directly or indirectly by five (5) or fewer Australian residents will be a "controlled foreign company" (CFC) for Australian anti-deferral tax purposes[64]. If the CFC only derives rent and portfolio capital gains, the Australian shareholder(s) will be assessable on the income and gains as it is derived. However, if the CFC has only business (trading) income which is not "tainted", none of the income is attributable to the Australian shareholder(s), even if the foreign income has not been subject to tax (from 1 July, 2004).

This outcome does not change if all the shares in the offshore company are held by a Transferor Trust in a tax haven[65], for asset protection reasons or otherwise[66].

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[62] In the light of the High Court decisions in *Nathan, Mitchum* and *Agfa-Gevaert*, "that the case was not a suitable vehicle to explore the distinction between questions of fact and issues of law". The Commissioner issued a Decision Impact Statement saying that the original decision of the AAT did not create a precedent. This is in contrast to his reliance on AAT decisions that suit him, on which he expressly relies in his rulings, ATOIDs, published guidance & instructions to counsel in conducting litigation.

[63] In *CIR v Hang Seng Bank Ltd* [1991] 1 AC 306. Lord Bridge said as to source of profits, at 322-323:" The broad guiding principle, attested by many authorities, is that one looks to see what the taxpayer has done to earn the profit in question." It is not who or where payments are made for the provision of the goods or services. More specifically, in *CIR v HK-TVB International Ltd* [1992] 2 AC 397 the Privy Council said at 402: "If a manufacturer in Hong Kong sells his goods to a merchant in Manila the payment which he receives is no doubt sourced in Manila but his profit on the transaction arises in and is derived from his manufacturing operations in Hong Kong." It is of course, to be remembered, that the UK legislation focuses on the source of profits, whereas the Australian legislation looks to the source of income, but bearing that distinction in mind, the reference to profit and income in the Privy Council cases is directly relevant. The reference to "direct or indirect sources" in s6-5(3)(b) and its predecessors has always been there, and was not considered to add anything to the question of source.

[64] Section 340 of Part X of the 1936 Act

[65] The island of Labuan is a Federal Territory of Malaysia, located close to Brunei. Labuan is an attractive tax haven for Australian purposes, as it has a common law system, with English as the business language, is in a more convenient time zone for Australia, and is also geographically much closer than European and Caribbean havens, and is also outside the EU Savings Tax Directive and has not entered into agreements for Mutual Enforcement of tax judgments. The EU Savings Tax Directive: Council Directive 2003/48/EC has applied since 1 July 2005. It applies throughout the EU, in 5 other European countries, and in various tax haven dependencies of the UK and the Netherlands. It requires payers of interest to automatically report identity to the beneficial owner's country of residence tax authority, or during the transition phase, for Belgium, Austria, and Luxembourg to withhold at 20% up to 30 June 2011, and at 35% thereafter, instead of exchanging information. Council Directive 77/799/EEC has required wholesale exchange of information on a request basis, between member states since 1977. It now also provides for spontaneous exchange of information in specified circumstances.

TRUSTS

It may be possible to use a trust with an Australian corporate trustee to invest into countries that have estate or inheritance tax[67].

However, some of the problems with onshore asset protection trusts, are likely to see the emergence of the greater use of such trustees out of Australian jurisdictions[68].

ONSHORE ASSET PROTECTION TRUSTS

As an Australian discretionary trust can last for 80 years (except SA, where the rule against perpetuities was effectively abolished[69]), it is inherently more flexible than holding assets personally, as the party to benefit from the holding of the asset can be changed from time to time, as circumstances change, through a number of generations. Generally speaking, the beneficiaries who are mere "discretionary objects" of such trusts have no "interest" in the trust assets which can become devisable property on the bankruptcy of the individual, and so such

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[66] The use of an offshore company owned by a Transferor Trust (TT) will often be administratively simpler, as the Australian resident principal can be a director of the company. The majority of directors will need to be resident where the company is to be resident If the company only has passive or "tainted" income, this will be attributed through the TT to the Australian resident transferor, but the capital of the company should be protected. The use of a tax haven company will usually allow more flexibility. If the Australian tax resident might cease to be an Australian tax resident for instance, if a sufficiently large capital gain was to be made on a tax haven trading company, it might have two (2) classes of shares. To enable tax free dividends to come back to Australia in the years before the sale, one class of share (with 10% of the voting rights) with discretionary dividend entitlement, would be owned by an Australian company in its own right (and entitled to s23AJ tax free dividends), while a TT might hold another class of shares which would also have discretionary dividend entitlement, which would only be used if the Australian (permanent) resident, ceased to be so, in an Australian tax year before the offshore company made the sale. Whilst this is an oversimplification of the concept, it is a workable plan if implemented carefully and there are real asset protection concerns. The use of the TT will also protect value in the non-resident trading company from potential creditors of the Australian resident principal. The Australian company that would hold the shares paying s23AJ dividends, would itself be owned by an Australian discretionary trust, also for asset protection and flexibility reasons.

[67] As noted above, this is not possible for the UK, and a unit trust may work for the US.

[68] Australia was a signatory to the Hague Convention On The Law Applicable To Trusts And On Their Recognition (1989), and gave it force of law by the *Trusts (Hague Convention) Act 1991*. This is important even for Australia, as a common law country, as the Convention specifies that the law chosen for the trust doesn't have to have a direct connection with the trust (Dicey Morris and Collins *op cit* at [29-016]), contrary to the position at common law: *Augustus v Permanent Trust Co (Canberra) Ltd* (1971) 124 CLR 245. It was signed by 13 of the 72 member countries of the Hague Conference on Private International Law, but its scope is wider as it was ratified by the UK on behalf of: the Isle of Man, Bermuda, British Virgin Islands, & Gibraltar, amongst others Crown dependencies (excluding the Bahamas and Cayman Islands). It is particularly important for the civil law countries for which the Convention has entered into force: Italy, Luxembourg, Monaco, Netherlands & Switzerland: see Marco Giacomo Bonalanza, "The Swiss Confederation, the trust and the taxation of immigrants", Vol 7, Issue 3 TQR (2009). Apparently Panama has now become a signatory.

[69] See "Tax issues with Modern Trusts: Avoiding the Vesting Day, Trusts domiciled in South Australia", Michael Butler, TIA SA Div 25 Sept 2008; and "The residence of companies and trusts revisited" TI International Masterclass, Michael Dirkis, NSW Div 17 Oct 2012.

traditionally, trusts have been valuable asset protection vehicles, which may also protect the particular structure from the application of the general tax anti-avoidance provision (Part IVA) as the dominant purpose of the structure may be seen to be asset protection: *FC of T v Mochkin* [2002] FCAFC 15.

As a general philosophy, persons in "at risk" occupations should always seek to avoid accumulation of wealth in the own names. Accumulating wealth individually, and belatedly gifting it to trusts is far less desirable than creating trusts and providing them debt funding or guarantying their arm's length borrowings, which will allow them to build wealth. For a recent example of the application of s121 of the Bankruptcy Act, see *Donnelly (Trustee) v Windoval Pty Ltd* [2014] FCA 80.

Nor should the client who is in the position of an appointor of an Australian discretionary trust going to find the trustee in bankruptcy stepping into his shoes[70]. Based on *Ross v Dwyer* (1992) 34 FCR 463 and *Re Burton; Wily v Burton* (1994) 126 ALR 557*,* an Australian court should not allow the substitution of the Australian resident controller's trustee in bankruptcy, for the appointor, to vest the trust in favor of the bankrupt's creditors[71].

A District Court in Florida has found the exact opposite in relation to the power of a appointment of an American over trustees of tax haven trusts in Bermuda and Jersey: *United States of America v Raymond Grant and Arline Grant* (S.D.Fla. 06/17/2005). The order in that case was that Arline Grant (the survivor of the defendants) use her power of appointment to substitute the tax haven trustees, with US trustees, or in the alternative to otherwise repatriate the assets held in the trusts. As Arline Grant was more than a mere discretionary object, indeed, she had the right to call on the trustees to provide her maintenance in the sum she said she required, the alternative order is more clearly understood. In that case the IRS was owed over US$36M by the defendants.

In Australia, an added safeguard when drafting a trust deed, is to have successor appointors, in the case of bankruptcy of an appointor.

The use of a memorandum of wishes by the principal of an Australian discretionary trust, is often overlooked, probably as the private company trustee is usually controlled by the principal while he is alive (unlike in an offshore trust[72]). However, on the demise of the principal, the beneficiaries may not see things in the same way, and trouble can then exist if they inherit the shares in the trustee. It would be best often, if the shares in the trustee are not left to the beneficiaries, but to a professional adviser, who armed with a memorandum of wishes may be better able to fulfill the wishes of the principal[73]. For some recent authority on whether a discretionary object is entitled to access a letter of wishes, see *Breakspear v Ackland* [2008] EWHC 220 (Ch), and *Read & Chang & Anor* [2010] FamCA 876*.*

[70] See James Kessler & Michael Flynn, "Drafting Trusts & Will Trusts in Australia", Thomson (2008) at [6.175].
[71] In any event, the deed should be drafted to provide for successor appointors in the case of bankruptcy or other incapacity.
[72] Where the trustee is likely to be an independent licensed trustee company.
[73] See generally, Kessler & Flynn *op cit* [6.85]-[6.95].

The memorandum of wishes for an Australian discretionary trust, will most likely become much more common in conjunction with the use of trustees independent of the family concerned, due to the non-tax decision in *Australian Securities and Investments Commission in the Matter of Richstar Enterprises Pty Ltd (ACN 099 071 968) v Carey (No 6)* [2006] FCA 814, a decision of French J (as he then was, having now been elevated to Chief Justice of the High Court).

ASSET PROTECTION CONCERNS

In the *Richstar* case a receiver was appointed over various trust assets on the basis that the defaulting debtor as a beneficiary and as in effective control of the trustee, had an interest in the assets, entitling the appointment of a receiver over them under the Corporations Act[74]. This has caused considerable consternation[75], as the case didn't even refer to *Re Burton; Wily v Burton* or *Dwyer v Ross*. For a display of some restraint after *Richstar*, see *ASIC v Burnard* [2007] NSWSC 1217, particularly at [69]-[71] and [76]-[78]. Also see *Public Trustees v* Smith [2008] NSWSC 397 and *Farr v Hardy* [2008] NSWSC 996. However, *Dwyer v Ross* was distinguished in *Rafferty v Time 2000 Waste Pty Ltd (No.9)* [2011] FCA 1483 at [58] to allow a freezing order to continue over trust property. In contrast, freezing order were not allowed to continue over trust property in *DFC of T v Elelmans* [2013] VSC 346 where the Commissioner relied on *Richstar*, at [45]-[46].

However, the uneasiness is still there, as high profile insolvencies darken the public and judicial mood, when the blameworthy individuals seem to have "salted away" assets for themselves[76].

As to whether a family discretionary trust will be able to be attacked by a party to an Australian family law dispute, the position still depends on the circumstances, and is no less easier to decide following the High Court of Australia decision in *Kennon v Spry* [2008] HCA 56 in which Gummow & Hayne JJ observed (at [89]):

> "the term 'property' is not a term of art with one specific an precise meaning. It is always necessary to pay close attention to any statutory context in which the term is used [and referred by way of footnote to *Richstar*]. In particular it is, of course, necessary to have regard to the subject matter, scope and purpose of the relevant statute".

[74] In s9 Corporations Act 2001 "property" is defined to mean "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action…"

[75] See "Trust Practices under threat- Discretionary trust interests: the Westpoint Litigation" Ron Jorgensen & Renuk Somers, TIA Vic Div 13 Sept, 2006 and Halperin *op cit*. But apparently no consternation to Justice Branson "The Bankrupt, His or Her Spouse ant the Family Trust- A Consideration of Part VI Div 4A of the Bankruptcy Act", ITSA 2006 Bi-Annual Conv.

[76] Also see "Trust me –I don't own anything!", Michael Lhuede, TIA Vic State Conv, Oct 2008. "Claims against the Estate (Warnings for Executors)", Craig McKie, TIA Estate & Succession Planning Intensive, WA Div 24 Sept, 2008 pp14-15. Also see other cases referred to in "Modern Day Trust Structures", Daniel Smedley, TIA Vic State Conv, Oct 2008 pp19-20 including *Kawaski (Australia) Pty Ltd v Arc Strang Pty Ltd* [2008] FCA 461 at [75], reference to *Lygon Nominees Pty Ltd v Commissioner of State Revenue* (2005) 60 ATR 135 at [58]. Also see "Wealth Preservation in a Sub-Prime World", Ken Schurgott, TIA WA State Conv. 2008 pp4-5; "Protecting the family assets (trusts and divorce): Part 1", Arlene Macdonald, The Tax Specialist Vol 14 No2 Oct 2010; "Trusts and Asset Protection Best Practice", Ken Schurgott, TIA National 24-25 September 2011; & "Asset Protection", Brian Richards, 2013 Qld Annual State Convention (TIA July 2013); "Potential to bust-proof a trust", Matthew Burgess, TI Qld Div 27 Feb 2104.

Family Law Act

It should be noted that for Australian Federal family law purposes, an Australian resident spouse may be in contempt of court[77] for not disclosing[78] the existence of onshore or offshore trust assets, even though they may be safe from other creditors. The penalty for an individual may involve imprisonment, and for a corporation may involve sequestration[79]. It should also be noted that there is legislation in all States providing protection to persons in *de facto* relationships.

As to whether a family discretionary trust will be able to be attacked by a party to an Australian family law dispute, the position still depends on the circumstances, and is no less easier to decide following the recent High Court of Australia decision in *Kennon v Spry*.

In that case, the husband was personally one of the trustees of a family discretionary trust, originally created in 1968, in which he held a power of appointment, and in which he and his former wife were discretionary objects, as were their children and other family. The husband excluded himself as a beneficiary in 1983. By a majority of 4:1 the Court held that orders could be made directly affecting the trust property under the *Family Law Act 1975*. It appears that the issue of whether the trust was a "financial resource" of the husband (or of the wife), was not a subject of the appeal, but will normally be an additional issue, allowing the existence of the value of the trust to be taken into account in the overall divide of marital property i.e. potentially indirectly affecting the assets of the trust. Of course, if most of the wealth of the parties to a marriage is in trust, an order against only a party to the marriage that the trust is a "financial resource" of one or other of them, won't allow recovery for the claimant[80].

The problem in *Kennon v Spry*, is that the majority differed as to how they reached their conclusion. It should first be observed that the dissenter, Heydon J reached the conclusion that neither the husband nor the wife had "property" in the trust as a matter of general law (referring to *Gartside v IRC* [1968] AC 553) at [56]), and that the position was no different for family law purposes under s79 (at [187]).

Of the majority, none mentioned *Gartside v IRC* directly, although French CJ noted that the husband's power as trustee to appoint assets or income to the wife "may not be property according to the general law" (at [79]).

It should be noted that s90AE of the Family Law Act (which was introduced in 2006), and allows orders to be made against third parties, was not available to the wife, as in the proceedings at first instance, she did not lead evidence as required by s90AE(4).

If a party to a marriage in Australia has settled or gifted property on an *inter vivos* trust outside Australia, even if the Family Law Court made s90AE against the foreign trustee (without assets in

[77] Family Law Rules 2004 – 13.14 Consequence of non-disclosure
[78] Family Law Rules - 13.04: Full and frank disclosure
[79] Family Law Act 1975 - s 112AP Contempt
[80] For a discussion of "financial resources" see Schurgott, "Wealth Preservation in a Sub-Prime World", *op cit* pp22-24, and Kessler & Flynn *op cit* at [4.40]-[4.50].

Australia), then it will it be extremely difficult to enforce especially, an Australian non-money order judgment in that jurisdiction[81].

Bankruptcy Act

Nor is superannuation the safe haven for asset protection that it once was. Amendments to the *Bankruptcy Act 1966* in 2006, particularly s128B, have allowed for "claw-back" of large late contribution before bankruptcy[82].

The 2006 amendments to Part 4A also limit the effectiveness of a strategy of allowing a spouse to have title to an asset such as a family home, which the at-risk spouse then funds by paying the mortgage[83].

Further, in *Trustees of the Property of John Daniel Cummins v Cummins* [2006] HCA 6; (2006) 224 ALR 280; (2006) 80 ALJR 589, in dealing with the question of whether there had been a fraudulent disposition in 1987, to which s121 of the *Bankruptcy Act* refers, the High Court were happy to infer, without evidence before the Court, that a senior counsel who had not lodged a tax return since 1955, must have been insolvent due to unpaid tax in 1987, even when there was no evidence of his income or expenses up to 1987. The law was changed in 2006 so that absence of books of account, creates a rebuttable presumption of insolvency[84].

OFFSHORE TRUST

Some tax havens have special legislation designed to make it difficult to attack the assets of an offshore trust in their jurisdiction. A good example in our region is Labuan, Malaysia. It is also particularly noteworthy, that unlike Hong Kong and Singapore, there is no reciprocal enforcement of judgments with Malaysia[85].

An offshore trust may have nothing to do with Australian or other investor country tax planning[86], e.g. estate or inheritance tax planning in the investee country, with the principal "content" to pay the home country tax attributable to them as "settlor"[87], as long as the assets in the trust are protected, or not to be distributed according to forced heirship rules in their

[81] If it is a common law country and it does not have Reciprocal Enforcement of Judgment legislation which covers Australian judgments.
[82] see Schurgott, "Wealth Preservation in a Sub-Prime World", *op cit* p14.
[83] see Schurgott *op cit* p11.
[84] see Schurgott *op cit* pp8-9.
[85] Although s29(5) of the Bankruptcy Act (Cth) does allow for assistance to be rendered in relation to international bankruptcies, including by virtue of regulations made, with Malaysia . For an example of assistance in relation to a UK bankruptcy, see *Dick as Trustee in Bankruptcy v McIntosh* [2001] FCA 1008. However, Malaysia is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency (1997), given effect in Australia by the Cross Border Insolvency Act 2008 (Cth).
[86] Almost all common law jurisdictions treat the place of residence of the trustees as a test for tax residence of the trust, however, the Supreme Court of Canada in *Fundy Settlement v The Queen* [2012] SCC 14 has focused on the place of "central management & control" of the trust, without any statutory direction to do so, such as s95(2)(a) of the 1936 Act.
[87] s102AAZD of the 1936 Act.

"home" country. *Abdel Rahman v. Chase Bank (CI) Trust Company Limited,* was a notable example of failure to implement correctly.

However, as a general philosophy, persons in "at risk" occupations or worried about blackmail or greenmail, should always seek to avoid accumulation of wealth in the own names[88]. Accumulating wealth individually, and belatedly gifting it to trusts is far less desirable than creating trusts and providing them debt funding or guarantying their arm's length borrowings, which will allow them to build wealth. Also, with the recent strengthening of the Australian anti-transfer pricing provisions, it is far better to create a business in a tax haven rather than to seek to transfer it after it has started to become valuable[89].

Transferor Trusts

The so called Transferor Trust rules (contained in Div 6AAA of the 1936 Act, and modeled on the US grantor trust rules) sought to prevent such deferral by attributing the offshore discretionary trust's income and gains to the party who had transferred property or services to the trust, unless the trust had borne tax at normal rates in one of seven (7) nominated high tax countries, or the transfer was to a trust under an arm's length dealing, and the transferor did not control the trust.

It is not having an interest in a Transferor Trust (TT) which is proscribed, it is the failure to declare the existence of the TT, and the income and gains from the TT. If the taxpayer's concern is asset protection and they are happy to pay Australian tax on the earning of the trust, but want to protect its capital from potential creditors, a trust formed under the *Labuan Trusts Act* (Malaysia), or similar regime, would fit the bill.

Also, for family planning purposes, assets which may not produce income but potentially large capital gains, can be held in a TT without any attribution, as it is only realised gains which are attributable. It may be that when the gain is to be realised, that one or more of the mere discretionary objects is living in one of the seven (7) high tax countries which are excluded from the TT, but whose tax rate may be substantially lower than Australia. Indeed, the TT may produce some income, but as long as it is declared as attributable, the fact that it flows from a significantly appreciating asset does not cause any issue in relation to that appreciation unless and until the gain is realised.

Alternatively, a sole transferor with respect to the TT may cease to be a resident in the tax year immediately proceeding the tax year in which the TT makes the capital gain, so that he is not an attributable taxpayer with respect to the TT in the year of realization, and his status as a "mere

[88] Persons resident in politically unstable countries may have the same concerns, and worried about being seen to have wealth, due to fear of kidnapping, which is not uncommon in for example, Latin America

[89] Refer draft TD 2014/D3 on reconstructive power under new s815-130, which may be particularly relevant to reorganizations. Whilst the ATO considered themselves as having an effective reconstructive power in TR 2011/1 under Div 13, the new Div 815B-D gives explicit power at least under the domestic law, but as it relates to DTA countries, Div 815A does not: refer "Will your current approach to Transfer Pricing compliance meet the new legislative requirements?", Paul Balkus, TI 29th Nat Conv. 26-28 March 2014, p7.

discretionary object" means that he isn't deemed to have a CGT event at market value on becoming a non-resident[90].

Testamentary Trusts

With globalisation, it is increasingly common for Australian-based families to have children go overseas to live for a period and, in some cases, for those children to permanently make their homes outside Australia.

If this is a likely reality for a family, then the Australian resident testator may consider creating a non-resident testamentary trust for the benefit of the child residing outside Australia.[91]

Resident testamentary trust

Resident testamentary trusts are relatively well known for their ability to provide worthwhile asset protection from beneficiaries' creditors,[92] and to provide graduated tax rates to beneficiaries who are minors[93] (which is not available through *inter vivos* trusts).

Australian resident trusts are taxed on their worldwide income, whereas non-resident trusts are only taxed in Australia on their Australian source income.

If a resident testamentary trust is set up for the benefit of a non-resident family member, and its income is Australian sourced, the non-resident family member will bear Australian tax on it.[94]

In general, an Australian resident trust with foreign source income and presently entitled non-resident beneficiaries is tax "transparent" i.e. neither the trustee nor those beneficiaries are taxed in Australia, but in some common circumstances, there are problems with:

- streaming particular types of income to particular beneficiaries;[95] and

[90] Even if he was, based on *Chief Comm. of Stamp Duties v Buckle* (1995) 32 ATR 75, the market value of the asset would not be great.

[91] A testamentary trust is created on the death of the testator by the terms of the will. This differs from an *inter vivos* trust, which is formed during the life of the settlor. In Australia, previously for stamp duties reasons, and due to s 102 of Div 6 ITAA 1936), a nominal settlor has first settled a small sum on trust, to which the client then makes a large gift or loan: see *Truesdale v Federal Commissioner of Taxation* (1970) 120 CLR 353. The stamp duty reason is generally no longer valid, as the various Duties Acts do not subject cash to *ad valorum* duty. In other foreign jurisdictions, any person who makes a gift to the trust is referred to as a settlor.

[92] Although trusts effectively controlled by beneficiaries have been subject to more attack in Australia in recent times: *Kennon v Spry; Richstar*.

[93] s 102AG(2)(d) of Div 6AA, ITAA 1936.

[94] s98(3), ITAA 1936. The non-resident beneficiary may get a credit for the Australian tax in their country of residence.

[95] Following the High Court decision in *Commissioner of Taxation v Bamford; Bamford v Commissioner of Taxation (*2010) 240 CLR 481, and amendments thereafter, only capital gains and franked dividends can be streamed to particular beneficiaries. While dividends, royalties and interest will only be subject to withholding tax in the hands of non-resident beneficiaries, the result of *Bamford* (as applied in *Commissioner of Taxation v Greenhatch* (2012) 203 FCR 134) is that a distribution to resident and non-

- trustees being subject to tax at the top marginal rate on notional income.[96]

So, if there are to be non-resident beneficiaries, and the income will not necessarily be Australian source, it might be better to start with a non-resident trust. This is especially so where the settled property will be cash, which can be invested overseas.[97]

Non-resident testamentary trust

Generally, income and gains of a non-resident trust will be taxed to an Australian resident transferor with respect to that trust i.e. as it is a Transferor Trust. These anti-tax-deferral provisions do not apply to a non-resident testamentary trust which meets the requirements of s 102AAL.

If a non-resident testamentary trust is set up for the benefit of the non-resident children, some of the Australian source income derived by the trustee may only be subject to Australian withholding tax (interest, royalties, unfranked dividends, managed investment trust distributions) which are at lower rates than marginal rates, or not subject to Australian withholding tax at all (fully franked dividends).

While, at first blush, it might seem appropriate for the non-resident testamentary trust to have trustees in the country of residence of the beneficiaries, if that is a high tax country (especially one without a dividend imputation system, such as the US), the total tax payable on all of the trust income may be quite high, even though only some of the income was distributed to a beneficiary.

If the amount to be settled is significant, so that the income needs of the beneficiaries might be quite small in relation to the trust's capital, it might make more sense to appoint trustees in a tax haven and to invest the trust capital in offshore markets which will not tax the income in the hands of the tax haven trustee. This will allow the trust capital to "snowball", as it will not be subject to year-on-year high taxation.

Further, if family members are likely to remain in overseas countries that have inheritance taxes (the UK, most Western European countries, and the US), it may be far more advantageous for inheritance tax planning that the testamentary trust not be resident in their country of residence/deemed domicile/ domicile, so that the capital of the trust will not be subject to that tax on the demise of the beneficiary.[98]

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resident beneficiaries including foreign income will be "blended", rather than streamed. This is also argued for in the stalled draft tax ruling TR 2012/D1.

[96] Although ATOID 2005/200, which has been withdrawn (on the basis that the Foreign Investment Fund (FIF) provisions to which it expressly referred are now repealed), is to the effect that attributed foreign income from a CFC or transferor trust is not "income" to which a non-resident can be presently entitled (as it is a notional amount rather than a distributable amount).

[97] If the trust started out as resident and became non-resident, it would be deemed to have disposed all of its non- "taxable Australian property" for CGT purposes, at market value.

[98] This will usually require that the beneficiaries be "mere discretionary objects" of the trust — that is, that it be a discretionary trust, with a memorandum of wishes left to the trustee so as to guide the exercise of the discretion.

If a testamentary trust had not been used, and cash bequests were made to beneficiaries in inheritance tax countries who used the bequests to buy assets there, then even if the beneficiaries resume Australian domicile, if they die leaving the assets in the inheritance tax country, their estate will have an inheritance tax liability on those assets.

If the beneficiaries must buy assets in inheritance tax countries, they would still be better to borrow from a testamentary trust based in a tax haven, and the trust take security over the asset, so the net estate liable to inheritance tax is reduced by that debt.

Basing the trust in a tax haven will generally produce better tax results, and better protect the assets of the trust from attack from creditors (potentially including Family Court orders).

How to make a testamentary trust non-resident?

A trust is a resident of Australia if it has a resident trustee, or its central management and control (CM&C) is in Australia, in either case, at any time during an Australian year of income.[99] A non-resident trust is one that is not a resident trust.[100]

The concept of CM&C is usually relevant to corporate tax residence, for example to determine the residence of a corporate trustee. When the current definition of resident trust was inserted, it seemed unnatural to use CM&C, as to that date it had not been considered to be relevant to trusts, and it has not yet been considered by an Australian court in relation to trusts.

However, a recent Supreme Court of Canada case, *Fundy Settlement v Canada*[101] (commonly referred to as the *Garron* case), applied the concept. In that case, a Barbados trustee did not save the *inter vivos* trust formed in Barbados from being a resident of Canada, as the court held the CM&C was in Canada with the trust's settlor. *Garron* has not yet been considered in Australia.

In relation to a non-resident testamentary trust, as the settlor is dead, and assuming the beneficiaries are non-residents, it will only be if the trustee[102] acts on instructions from an Australian resident appointor/protector, rather than to properly exercise its duties as trustee, that there might be a question of CM&C being in Australia.

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[99] s95(2) of Div 6, ITAA 1936.

[100] s95(3) of Div 6, ITAA 1936.

[101] *Fundy Settlement v Canada* 2012 SCC 14; [2012] 1 SCR 520.

[102] Who should be trustee of the non-resident testamentary trust? When a will is being prepared, it is usual to approach individuals who might be nominated to be executors and trustees to see if they are likely to accept appointment. Such individuals are usually family members or trusted professional advisers. Family members will act gratuitously, but professional advisers will generally want a clause in the will to allow them to charge professional fees for their professional work (and, often, non-professional time expended) on the estate. An Australian licensed trustee company will charge significant fees for so acting, both as a percentage of assets in the estate and as a percentage of the income of the estate and various other charges, such as hourly rates for additional work or time. Non-resident licensed trustee companies are no different. Whereas Australian licensed trustee companies are heavily regulated, the regulation of such companies overseas is variable. The fees are also subject to huge variation from jurisdiction to jurisdiction.

Can the decision who should be trustee be left to the executors under the will?

While invalid delegation of testamentary power is unlikely to pose a problem to leave it to the executor to choose the non-resident trustee, there is a serious issue with s 102AAL of ITAA 1936. The cautious view is that the particular non-resident trustees should be nominated in the will so as to obtain the benefit of s 102AAL, so that the executors making the transfer to the non-resident testamentary trust will not be taxable in Australia under the transferor trust provisions of Div 6AAA.[103]

EXAMPLE OF OFFSHORE ENABLING TRUST LEGISLATION

In some tax havens, there has been a movement away from some traditional trustee duties, which, for example, has extended to the lessening of trustee liability. This has resulted in some commentators discussing whether the "irreducible core" concepts of a trust, as entrenched in English law, are being left behind in favour of measures to drive new business.[104] Indeed, if the legislature went too far, there is a risk that these special trusts may be considered by onshore courts to be bare trusts, such that the client is regarded as the beneficial owner.

In addition, some tax havens have introduced laws specifically drafted to make actions (chiefly from overseas) against offshore asset protection trusts particularly difficult, which, combined with the potential taxation advantages,[105] makes their use in these jurisdictions significantly more attractive than in the past.

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[103] s102AAL provides: "A reference in this Division to a transfer of property or services to a trust estate does not include a reference to a transfer made by the trustee of the estate of a deceased person under … the terms of the deceased person's will or codicil or an order of a court that varied or modified the provisions of the deceased person's will or codicil … unless … the transfer was made in or as the result of the exercise (by the trustee or any other person) of a power of appointment or any other discretion …". Issues arise from having to nominate a particular non-resident trustee in the will, for example if the testator is still relatively young, so that the trust will not "spring" for maybe 30 years. Is nominating a particular trust company or its successor in title enough? Should cascading trustees be appointed? What if it turns out that their fees are exorbitant, or the tax or trust law of the chosen jurisdiction is unsuitable when the death occurs? The answer is probably to specify an appointor in the testamentary trust, who can change the trustee. In any event, these issues may be able to be managed on each review of the terms of the will, which should take place every five or less years, in any event. As a last resort, if the nominated trust company proves to be a problem, the court can be approached to vary the terms of the will so as to continue to obtain the benefit of s 102AAL.

[104] Commentators referred to by the Hon Anthony Smellie QC in his speech "Balancing the requirements of the trust with fairness and probity - a perspective from the Cayman Islands", *International Trusts & Private Client Conference*, Ritz-Carlton Hotel, Cayman Islands, 5 October 2012. See also B Steiner, "A rock, a hard stone and the unknown — trustees duties and liability for operating companies" (2011) 10(4) *Trust Quarterly Review* 29, p 30.

[105] The taxation advantage of most offshore trust jurisdictions is simply that they generally do not levy any significant tax. However, for clients in high-tax countries such as Australia, the income and gains of such trusts will usually be "attributed" to the client under the "transferor trust" (TT) regime. Penalties apply even for failure to disclose the existence of such a trust. Generally, such attribution ceases on the death of the client, or the client ceasing to be a resident, so that thereafter income can be accumulated offshore for family members with no onshore tax until the beneficiary accesses the funds. If the client's purpose is principally asset protection, paying tax on the offshore trust's income may not be an issue, as that would have happened had the trust been an onshore trust. Interestingly, since the abolition of the "foreign investment fund" (FIF) regime on 1 July 2010, TTs can obtain Australian tax deferral on what would have

As a result of the increased attacks on onshore discretionary trusts, we are likely to see an increase in the use of trusts in offshore jurisdictions by well-informed business people, especially in offshore jurisdictions where there is no reciprocal enforcement of judgments legislation in force[106].

Professional trustees have generally sought to overcome some of the traditional trustee duties[107] by having the trust acquire shares in a company though which the client can carry out the intended activities, rather than though the trust itself,[108] and ensuring that the trust deed contains an "anti-*Bartlett* clause", to absolve the trustee from any duty to interfere with the management of the company. In *Bartlett v Barclays Bank Trust Co Ltd,*[109] a trustee was found to be under a duty to act in relation to investee company shares that had dramatically dropped in value.

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been FIF interests, and even if the proposed "foreign accumulation fund" (FAF) regime comes into force, as it only deals with "debt interests", the TT can get tax deferral on non-distributor managed equity funds in tax havens. The newly elected government has said they are not going to proceed with this measure (along with many others of the previous government), but it remains to be seen whether it might be resurrected if avoidance activity becomes apparent.

[106] The Foreign Judgments Act 1991 (Cth) deals with "money judgments". For a recent example of the application of the Act, see *IMO of an application by CJ CGV Co Limited* [2013] VSC 656. The Cross Border Insolvency Act 2008 (Cth) may be relevant to bankruptcy or insolvency, and the winding up of companies, but note that, to date, of the countries discussed in this article, only New Zealand and the British Virgin Islands have adopted the UNCITRAL Model Law upon which it is based. Australia has not adopted any international treaty that deals expressly with property disputes in the family law context, and so the Foreign Judgments Act is the only relevant legislation. Traditionally, foreign revenue judgments were not enforceable at common law: *Government of India v Taylor* [1955] AC 491. This position does not apply between EU members (Council Directive 2001/44/EC). Australia has limited Double Taxation Agreements that require it to enforce tax on behalf of treaty partners such as New Zealand, Finland, Norway, France and South Africa. However, Australia has ratified the Organisation for Economic Co-operation and Development's Mutual Administrative Assistance in Tax Matters Convention, as have some 80 other countries — notably not including Malaysia. It is said by Treasury that the Convention became effective domestically from 1 Dec 2012 by virtue of the operation of Div 263 Sch 1 TAA.

[107] The duties of an onshore trustee are onerous but, in particular, these duties include to:

- exercise the care, diligence and skill of a prudent person (a higher standard applies to trustees whose profession, business or employment involves them acting as trustees): Trustee Act 1958 (Vic), s 6(1). Note that codified duties of trustees are covered by equivalent legislation in other jurisdictions, such as the Trustee Act 1925 (NSW), s 14A(2)(a).
- keep suitable, accurate and up-to-date records, which beneficiaries can request to inspect; *Schmidt v Rosewood Trust Ltd* [2005] UKPC 26; *Breakspear v Ackland* [2008] EWHC 220 (Ch); *Read & Chang & Anor* [2010] FamCA 876; and
- invest funds: *Byrnes v Kendle* (2011) 243 CLR 253 at [22]–[23], [72]–[73], [119]; in accordance with the terms of the trust: Trustee Act 1958 (Vic), s 6(2).

[108] From an Australian tax perspective, where the funds placed offshore are to be invested in an active business, they would normally be subscribed into a controlled foreign company (CFC) to carry on the business and, generally, such income will not be attributed from such a CFC and the CFC does not pay a dividend to the trust. Often, there will be two classes of shares in the CFC with discretionary dividends payable on a class of share held onshore by an Australian resident company, so that the dividend can be received tax free under the participation exemption (Income Tax Assessment Act 1936 (Cth), s 23AJ).

[109] [1980] 1 All ER 139.

Perhaps the best known of all offshore tax havens[110] is the British Virgin Islands (BVI). In 2004, the Virgin Island Special Trusts Act 2003 (BVI) (VISTA) came into force. The Act was, principally, established to enable a trust of shares in a company to be established under which:

- the shares may be retained indefinitely; and
- the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee.[111]

In other words, a VISTA trust allows protection of the trustee over and above what may have been available by virtue of a potentially unenforceable anti-*Bartlett* clause.

At common law, except in relation to trusts with charitable purposes, to be a valid trust there must be beneficiaries. However, non-charitable purpose trusts have been developed in a number of offshore jurisdictions. The Cayman Islands, which is another well-known tax haven,[112] introduced the Special Trusts (Alternative Regime) Law 1997 (Cayman Islands) (STAR) to allow for the establishment of STAR trusts where the beneficiaries and/or objects, may be persons, purposes, or both.

Both BVI and the Cayman Islands have allowed settlors some reserved powers.[113] Recently in Cyprus,[114] s 4A of the 2012 amended Cyprus International Tax Law grants settlors broad reserve powers[115].

The most litigated of the special trust provisions are probably those in Jersey[116] in relation to English divorce proceedings,[117] as Jersey has reciprocal enforcement of judgments with the United Kingdom. The Trusts (Jersey) Law 1984 was amended in 2006 so as to give precedence to the Jersey law over the personal law of the settlor or beneficiary in relation to the validity or interpretation of a Jersey trust, dispositions to the trust, capacity of a settlor, and powers and liabilities of the trustee, including claims of heirship rights (other than for a Jersey settlor) or

[110] There is no income tax in the British Virgin Islands. However, there is reciprocal enforcement of judgments legislation with Australia (in Australia, see the Foreign Judgments Regulations 1992 (Cth)).

[111] Virgin Island Special Trusts Act 2003 (BVI), s 3.

[112] There is no income tax in the Cayman Islands. However, there is reciprocal enforcement of judgments legislation with Australia.

[113] Section 86 of the British Virgin Islands Trustee Act 1961 and, in the Cayman Islands, the Trusts (Amendment) (Imminent Effect of Reserved Powers) Law 1998.

[114] Cyprus is a tax haven of sorts — that is, there are special low-tax rules for non-resident controlled entities. For example, there is no income tax on foreign-source income of an "international trust". Note that there is no reciprocal enforcement of judgments legislation with Australia. However, as the recent banking crisis in Cyprus shows, careful consideration is needed regarding where bank accounts should be kept and not keeping "all the eggs in the one basket".

[115] See E Yiolitis, "The powers that be" (2013) 20(10) *STEP Journal* 53.

[116] Jersey is a tax haven of sorts, as it does not have capital gains tax and does not tax foreign source income or interest on Jersey bank deposits.

[117] See J Gleeson, "Alteration or variation? Mubarak v Mubarak in the Royal Court of Jersey" (2008) 6(4) *Trust Quarterly Review;* Z Howard, "Aaliya Mubarak v Iqbal Mubarik [2008] JCA 196" (2009) 7(1) *Trust Quarterly Review*; A Laws, "Mubarak, a Guernsey viewpoint" (2009) 7(1) *Trust Quarterly Review.* The Trusts (Amendment No 5) (Jersey) Law 2012 (entered into force 2 November 2012) has made refinements in the light of *Mubarak*.

other claims based on a personal relationship with the settlor, with foreign judgments not to be enforceable inconsistent with such provisions.[118]

Generally speaking, jurisdictions that follow English common law are, naturally, where it would be expected that asset protection trusts might be most useful. Within the Australian business day, Hong Kong, Malaysia, Singapore, New Zealand and Vanuatu come to mind. However, only Labuan, Malaysia incorporates all of the most recent innovations.

Labuan, Malaysia

The island of Labuan is a Federal territory of Malaysia and has been set up since 1990 as a tax haven. As well as being part of the common law system, special Federal statues deal with tax,[119] company and trust law for Labuan entities.[120] The Labuan Trusts Act[121] (LTA) provides for the regulation of Labuan trusts and confers statutory benefits on Labuan trusts,[122] which are the ultimate in the development of asset protection trusts. Since 2010, these benefits include settlors' reserved powers, choice of no perpetuity period,[123] and, like the VISTA trusts in BVI, a Labuan special trust absolves the trustee from responsibility in relation to the affairs of a Labuan company in which it owns shares (s 46F).

Sections 10 and 11 of the LTA contain some of the most important benefits provided to Labuan trusts, by putting up barriers to enforcement of foreign claims.

- Section 10(1) specifies that no foreign law or judgment in relation to marriage, succession rights or insolvency (except as allowed under s 11) will be enforceable against the Labuan trust.
- Section 11(1) places the onus of proof, beyond reasonable doubt, on any claimant against a Labuan trust, to prove that the settlor created, registered or disposed of property to a Labuan trust with an intent to defraud that creditor, and that transaction rendered the settlor insolvent, or without property to meet that claimant's debt.
- Section 11(4) specifies that the creation, registration or disposition shall not be fraudulent if that happens before the creditor's cause of action against the settlor accrued. Section 11(3)(a) does likewise where the creation, registration or disposition occurs more than two years after the creditor's cause of action accrues. Where the creditor's cause of action accrues within two years of the creation, registration or disposition, it shall not be fraudulent if the creditor fails to commence action in Labuan within one year of the creation, registration or disposition (see s 11(3)(b)). This is a very strict and severe limitation period, which would defeat most potential litigants.

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[118] Jersey does not have reciprocal enforcement of judgments with Australia, but is listed by regulation to s29(5) of the Bankruptcy Act.

[119] A Labuan trust is not taxed on investment income, and on trading income is taxed at 3% of audited profit, or a flat tax of RM20,000 (about US$6600), by election — in which case, no audit is needed. A Labuan company is subject to the same tax regime.

[120] Under the Hague Trusts Convention, the specification in the trust deed that the law of the trust will be that of Labuan, Malaysia, must be recognised by signatories to that convention (ie, including Australia).

[121] Labuan Trusts Act 1996 (Labuan, Malaysia) — the legislation is available at http://labuanfsa.gov.my/web/guest/legislation

[122] For commentary, see M Lea, "Twenty first century trusts" (2010) 18(2) *STEP Journal* 65.

[123] Sections 8B and 16(2) respectively.

- Section 11(5) specifies that a settlor will not have imputed to him or her an intent to defraud a creditor because the settler has created or registered an offshore trust, or disposed of property to it, within two years from the date of the creditor's cause of action accruing, or because the settlor is a beneficiary of the trust.
- Section 11(1)(b) specifies that a successful claim may only be met out of the property of the trust the subject of that fraudulent transaction, but otherwise leaves the Labuan Trust intact.

Thus, aside from being required to discharge a criminal burden of proof, the creditor's claim will not put the other assets of the Labuan trust at risk and no such claim could void the creation or resettlement of the Labuan trust. This stands in stark contrast to the usual range of equitable remedies in such cases, which would, save for s 11(1), include a declaration that the trust is void, orders against the trustee to account and equitable damages.

It should also be emphasised that the Malaysian Reciprocal Enforcement of Judgments Act 1958 does not name Australia as a jurisdiction from which judgments will be able to be registered under that Act. Accordingly, a party, for instance, to a family law dispute will need to claim enforcement of the Australian judgment under common law principles in Malaysia. One ground for refusal will be Malaysian public policy,[124] and the provisions of LTA will prevail.[125]

The above protections, combined with the way Labuan trusts are taxed, make Labuan an attractive option for business people in the Australasian time zone.[126] As noted above, Australia having enacted provisions from *Hague Convention on the Law Applicable to Trusts and on Their Recognition* (1989), the specification in the trust deed, that the law of the trust will be that of Labuan, Malaysia, must be recognised by Australia: Article 6.

MIGRATION TO AUSTRALIA

One long standing positive about Australian tax from a taxpayer's perspective was the absence since 1980 of any State or Federal death or gift duty, so that retirees or other wealthy migrants from countries with inheritance tax may have sought to adopt an Australian domicile of choice, to escape the clutches of their country of origin inheritance tax.

However, it is perhaps the abolition of Australian taxation on the foreign source investment income of "temporary residents" that has excited the imagination of many prospective potential wealthy migrants[127].

The issue of common law residence[128] was considered in *Gains-Cooper v HMRC* [2006] UKSPC 00568 before the Special Commissioners in the UK, where the law was analyzed, and as the

[124] See A V Dicey, J H C Morris and L A Collins, *The Conflict of Laws* (14th ed), Sweet & Maxwell, London, Rule 44, and the reference at [14-143] to *Mayo-Perrot v Mayo-Perrot* [1958] IR 336.
[125] See, generally, *Jupiters Ltd (t/as Conrad International Treasury Casino) v Gan Kok Beng* [2007] 7 MLJ 228. See also, generally, K Pham, "Enforcement of non-monetary foreign judgments in Australia" (2008) 30 *Sydney Law Review* 663 and Dicey, Morris and Collins, above note 31, ch 14.
[126] see "Twenty first century trusts", Mark Lea, STEP Journal, Feb 2010. The benefits of LTA do not require registration with the Labuan authority, but registration may avoid arguments about the date of creation, or status as a Labuan Trust.
[127] from 6 April, 2006 (Div 768-R of the 1997 Act)

stakes were very high, the case was argued with considerable resources[129]. As the appeals were limited to errors or law, and the appeal courts found none, the Special Commissioners decisions stood. HMRC also had success in subsequent cases[130]. In recent years cases dealing with residence of individuals in Australia have not moved past the AAT[131].

Mr Gains-Cooper was found by the Special Commissioners to have remained a resident of the UK[132], whether or not he had become resident in the Seychelles, with which the UK does not have a double tax agreement (DTA).

Whilst Mr Gains-Cooper (and another's) administrative appeal was dismissed by the Supreme Court of the UK, reported as *Davies & Anor v HMRC* [2011] UKSC 47, the Supreme Court did say:

> 13. In the absence to date of any statutory definition of residence taxpayers and their advisers have had to turn to the guidance given by the courts – and, importantly, also by the Revenue – in relation to its meaning. But the courts have not – nor, as we shall see, has the Revenue – found it easy to formulate the guidance. For more than 80 years the leading authority has been *Levene v Inland Revenue Comrs* [1928] AC 217. Until 1919 Mr. Levene was resident and ordinarily resident in the UK. During the next five years he spent about five months (mainly in the summer) each year, staying in hotels in the UK and receiving medical attention or pursuing religious and social activities. He spent the remaining months staying in hotels abroad. The appellate committee declined to disturb the conclusion of the commissioners that Mr Levene had remained resident and ordinarily resident in the UK during those years. Viscount Cave, the Lord Chancellor, adopted, at p 222, the definition of "reside" given in the Oxford English Dictionary, namely "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place"; and, of these three descriptions, the Lord Chancellor chose, no doubt as being the most helpful, that of a "settled or usual abode".
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> 14. Since 1928, if not before, it has therefore been clear that an individual who has been resident in the UK ceases in law to be so resident only if he ceases to have a settled or usual abode in the UK. Although, as I will explain in para 19 below, the phrase "a distinct break" first entered the case law in a subtly different context, the phrase, now much deployed including in the present appeals, is not an inapt description of the degree of change in the pattern of an individual's life in the UK which will be necessary if a cessation of his settled or usual abode in the UK is to take place. (underlining added)

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[128] For a discussion of the relevant matters that the Commissioner will take into account in determining whether a person is resident according to ordinary concepts see Taxation Ruling TR98/17.

[129] Also see *Shepherd v HMRC* [2005] UKSPC 00484

[130] *Barrett v HMRC* [2007] UKSPC 00639; *Grace v HMRC* [2009] EWCA Civ 1082; *Genovese v HMRC* [2009] STC (SCD) 373; *Hankinson v* HMRC [2009] UKFTT 284 (TC); *Tuczka v HMRC* [2010] UKFTT 52 (TC); *Turberville v HMRC* [2010] UKFTT 69 (TC); *Broome v HMRC* [2011] UKFTT 760 (TC); *Ogden v HMRC* [2011] UKFTT 212 (TC); *Kimber v HMRC* [2010] UKFTT 107 (TC); *Rumbelow &Anor v HMRC* [2013] UKFTT 637 (TC); but not in *James Glyn v HMRC* [2013] UKFTT 645 (TC).

[131] *Mynott and the Commissioner of Taxation* [2011] AATA 539; *Iyengar and the Commissioner of Taxation* [2011] AATA 856; and *Sneddon and the Commissioner of Taxation* [2012] AATA 516; *Murray and the Commissioner of Taxation (No 3)* [2012] AATA 557; *Boer and the Commissioner of Taxation* [2012] AATA 574; *Sully and the Commissioner of Taxation* [2012] AATA 582; *Browne and Commissioner of Taxation* [2013] AATA 866; *Guissouma and Commissioner of Taxation* [2013] AATA 875.

[132] His substantive appeals to the High Court [2007] EWHC 2617 (Ch), and the Court of Appeal were dismissed [2008] EWCA Civ 1502.

In recent years there have been several UK cases dealing with the issue of common law residence. Most recently, it was considered in *Glyn v Revenue & Customs* [2013] UKFTT 645 (TC) (8 November 2013). Like in Australia, the question of residence has until recently (when the UK adopted a statutory residence test), been a question of fact, so the analysis of what needs to be considered often took place in a Tribunal rather than the Courts. The UK cases have made considerable reference to concepts of "distinct break" and "settled purpose", which phrases have not been used in the Australian cases.

In *Glyn's* case, the Tribunal said:

> 118. ... we should concentrate predominantly on three tests, as follows:
>
> - first, on and after 5 April 2005, did the Appellant make a distinct break from his former way of life, by which we consider it important to assess whether he commenced a quite different and intended way of life in Monaco, and whether he can demonstrate not only the required substantial loosening of ties with family, friends and former business life, but whether his whole way of life changed;
> - secondly, having regard to the importance of 50 Circus Road [London] to the Appellant, did 50 Circus Road remain a habitual abode, and more particularly a habitual abode in the UK for a settled purpose, when the Appellant was fundamentally living in Monaco? and thirdly for how long was he in the UK; can those periods of presence realistically be described as "visits", and were they or were not for a settled purpose." (underlining added)

The Tribunal also said:

> 117. Since the Supreme Court's decision in *Gaines-Cooper...* it is virtually critical to demonstrate a "complete break", and that this requires it to be shown that the person has not necessarily severed family, social and business ties with the UK, but that at least there has been a "substantial loosening" of such ties. Much of our consideration of the facts in this case will revolve around whether there has been such a "distinct break", and whether there has been the required "substantial loosening" of ties. (underlining added)

There is no DTA between the UK and Monaco. As there is a DTA between the UK and Australia, with a "tie breaker", the disposal of a permanent home in the UK and the acquisition of one in Australia would be one of the steps that could be taken by a UK domicile, firstly, to ensure that dual residence is resolved in favor of Australia under the 'tie breaker", and secondly, as an assistance on the path to acquiring an Australian domicile of choice for UK IHT purposes.

Ironically, non-domiciles of the United Kingdom, find it attractive to reside but not adopt a domicile of choice in the UK, in order to make use of the remittance basis of taxation applicable to non-UK domiciles. The *Finance Act 2008* made reliance on the remittance basis of taxation less attractive, after seven years of residence in any nine year period, by requiring the payment of £30,000 tax just for the privilege[133].

[133] Increasing to £50,000 tax when resident in at least 12 of the previous 14 years (for 2012-3); now s809H Income Tax Act 2007. As well as the remittance basis, the "transfer of assets abroad" provisions, which attribute foreign source income, do not apply to non-domiciles.

Mutual Assistance in Tax Recovery

Until recently, for persons migrating from Europe, unlike the position in the EU[134], Australia has so far only entered into a few bilateral treaties allowing Australia to collect tax on behalf of other countries revenue authorities i.e. New Zealand, Finland, Norway, South Africa and France. Australia has also signed Tax Information Exchange Agreements ("TIEAs") with about 25 tax havens outside the framework of comprehensive double tax agreements[135]. To distinguish between "cooperating" tax havens and non-cooperating, the latter are now being referred to by the ATO as "tax secrecy jurisdictions".

Alongside the EU pressure, the OECD's so-called "Harmful Tax Competition" Project[136] has resulted in tax havens being forced to become more transparent by agreeing to abolish bank secrecy, and to share that information with the Revenues of the countries where those investors are resident[137].

Originally that was only successful against the small island countries[138], whereas economically relatively powerful non-OECD countries, such as China (including Hong Kong), Malaysia and Singapore, were unaffected. However, the threat of sanctions has now caused even those countries to comply[139]. Tax preferred arrangements for foreigners only, within OECD members, have been largely removed, but the tax competition between countries tax systems as a whole, has probably increased, rather than harmonised[140].

At a 2014 meeting of the G20, moves to automatic exchange of information were announced, following though on the OECD's Base Erosion and Profit Shifting (BEPS) project.

[134] Council Directive 2001/44/EC

[135] Also, existing comprehensive DTA are being renegotiated to include the 2005 OECD model Art 26 on exchange of information, which in new sub-Art (5) expressly says that a country's bank secrecy law shall not apply to block such a request. Such a protocol has recently been signed by Australia with Singapore & with Malaysia, and between the US & Switzerland (although Switzerland has emphasized the OECDs own view that it doesn't allow "fishing expeditions": see "Confidence in confidentiality", Nigel Bradley, STEP Journal, Jul/Aug 2009). Also see "International Tax Cooperation - Recent Trends and Challenges Old and New", Ken Lord, TIA International Tax Masterclass 24 Sept 2009 at 17-18.

[136] OECD Report on Harmful Tax Competition - An Emerging Global Issue (1998); OECD Report: Towards global tax co-operation: Progress in identifying and eliminating Harmful Tax Practices (2000); OECD Harmful Tax Project: 2001 Progress Report; OECD Harmful Tax Project: 2004 Progress Report; Progress Towards a Level Playing Field: Outcomes of the OECD Global Forum on Taxation (2005);
J C Sharman, "Havens in a Storm", Cornell University Press (2008)

[137] "Harmful tax competition: Defeat or victory" Jogarajam & Stewart (2007) 22 Australian Tax Forum

[138] Land-locked Liechtenstein is not in the OECD, and was one of the last countries to be holding out against the Project. The others were Andorra, Liberia, Monaco & the Marshall Islands

[139] According to the OECD list published 18 February, 2010

[140] Refer for instance, to "The OECD and the Offshore World", R Hay, ITPA Journal Vol VII No 3 (2007). Even after the GFC in 2011, and Ireland's need for EU assistance, it refused to increase its 12.5% corporate tax rate notwithstanding considerable pressure from France and Germany, in particular.

CEASING AUSTRALIAN TAX RESIDENCE

A client who wishes to retain tax residence in Australia, but who proposes to spend a lot of time traveling needs to understand the risk of becoming a tax resident of any country where he is not a "mere traveler". For a client who is carrying on a business or is a director or executive of a corporate taxpayer, it is necessary to understand that the client's presence in another country be limited so as not to create a "fixed base" for the individual or "permanent establishment" of the company, in the host country.

Estate planning for some wealthy Australians may involve ceasing to be a tax resident of Australia[141].

Firstly, it should be noted that on ceasing to be an Australian tax resident, the taxpayer triggers CGT event I1 on all his CGT assets other than "taxable Australian property", unless he elects to pay tax only on realization (and resumption of residence). Holding assets in discretionary trusts or companies owned by discretionary trusts usually overcomes that issue. Secondly, a non-resident individual has a starting tax rate on Australian source income of 32.5% (if it is not subject to withholding tax, commonly at 10%) i.e. no tax free threshold or graduated rate up to 32.5%.

There is a wide-spread myth that leaving Australia for as short a period as two years, will necessarily suffice to become a non-resident for tax purposes. This has arisen due to para 25 of IT 2650 which actually only says that an absence of 2 years "would generally be regarded by this Office as a substantial period for the purpose of a taxpayer's stay in another country"[142]. IT 2650 discusses *Applegate*'s case[143], where the taxpayer was only out of Australia for two years. However, in that case he left the country indefinitely[144], and only returned from Vila, in two years, due to ill health.

More certainty of outcome can be achieved for tax planning, by the use of a suitable double tax agreement (DTA)[145], which contains a dual residence "tie-breaker".

For such a person, there is no point going to be resident in another high tax country, and so a country with a territorial system of taxation which also has a DTA with a "tie-breaker" fits the bill.

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[141] See material in the Appendix on the definition of Australian tax resident.

[142] The importance of establishing residence in a particular foreign country can be seen from the case of the physiotherapist on a working holiday for 5 years, who was found to have remained a tax resident of Australia throughout that period: *AAT Case 12,511* (1998) 37 ATR 1263.

[143] 79 ATC 4307, followed by a statement about an absence of anything less than two years being "transitory" in IT2650 at [27].

[144] Whilst *Applegate*'s case was said to be applied in *FC of T v Jenkins* 82 ATC 4098 at 4101, Mr Jenkins did not leave Australia with the intention to be out of Australia indefinitely, but for three years, which was enough on the facts of that case, to mean that he had a "permanent place of abode" in Vila, as his presence there was not "temporary".

[145] This will help avoid the result that occurred for the taxpayer in the UK case of *Gains-Cooper v HMRC*, who unsuccessfully argued that he had established tax residence in the Seychelles, to the exclusion of the UK. The UK does not have a DTA with the Seychelles.

In S-E Asia, the more predictable results may follow in Singapore or Malaysia, which countries will also allow reasonable business infrastructure. As Hong Kong does not have a DTA with Australia, it is not suitable. Singapore is well known as an expensive place to live, although the tax position is quite positive[146]. Malaysia is a lot cheaper, and on closer examination, may well be the best choice on the tax front as well[147].

Dual residence

Dual residence is often resolved in DTAs. For example, Article 4 "tie-breaker" of the Malaysia/Australia DTA provides:

"2. Where by reason of the preceding provisions an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:

(a) he shall be deemed to be a resident solely of the Contracting State in which he has a permanent home available to him;

(b) if he has a permanent home available to him in both Contracting States, or if he does not have a permanent home available to him in either of them, he shall be deemed to be a resident solely of the Contracting State in which he has an habitual abode;

(c) if he has an habitual abode in both Contracting States, or if he does not have an habitual abode in either of them, he shall be deemed to be a resident solely of the Contracting State with which his personal and economic relations are the closer.

3. In determining for the purposes of paragraph 2 the Contracting State with which an individual's personal and economic relations are the closer, the matters to which regard may be had shall include the citizenship of the individual." (underlining added)

1. **OECD Commentary**

Permanent Home

Under the tie-breaker, the first test to break the dual residence, is where the taxpayer has a

[146] For instance, the top marginal rate of tax for a Singapore resident individual is 20%, and is not incurred until the individual's taxable income reaches S$320,000, compared to 45% in Australia, once taxable income reaches A$180,000. Singapore does not have a CGT but speculative profits are treated as income. However, unlike the Other Income Article of the Australia / Malaysia DTA, the effect of Art 16A of the Australia / Singapore DTA is to preserve each country' rights to tax a dual resident on third country source income.

[147] There is no CGT in Malaysia, except for real estate (which fades out after 5 years of ownership), but speculative profits are taxed as income. Whilst a Malaysian resident individual will pay a top marginal rate of 26% once taxable income reaches RM100,000, directors fees from a Labuan company are currently not taxed, and there is currently a 65% exemption from tax on managerial salaries from a Labuan company. Further, if the individual controls the Labuan company, there is nothing in the tax law to compel them to pay themselves a taxable salary (although some "remuneration" must be specified in an application for a work visa). The Other Income Article of the Australia / Malaysia DTA, reserves the right to tax third country source income to the state of deemed sole residence: unlike Singapore.

"permanent home". As the terms of the tie-breaker usually follow the OECD model DTA, the Commentary on the model is relevant:

> "12…it is considered that the residence is that place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration.
> 13. As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.)."

It will be observed that whilst nationality (and indeed dual citizenship) is relevant to the "tie breaker", it is not directly relevant to the domestic definition of Australian tax residence.

It should also be observed that the ATO is understood to have the view that DTAs don't deal with attributed income under the CFC or Transferor Trust regimes, and therefore that DTAs don't affect the operation of the Australian domestic law[148]. The DTA resolution of dual resident is only "for the purposes of the treaty" i.e. is only in relation to items of actual income covered by the treaty, and therefore not for actual income from third countries, unless there is an Other Income Article: in Canada most recently, that approach has found favor in relation to third country source income of the taxpayer in 2002, before the Other Income Article (20A) of the Canada / UK DTA became operative: *Conrad Black v The Queen* 2014 TCC 12 see particularly at [62]. That the resolution of dual residence is only for "for the purposes of the treaty" explains why in TR97/17 at [66], the Australian Commissioner says a dual resident is entitled to the tax free threshold, to which a "pure" non-resident is not entitled.

The Australian Commissioner's approach would mean that a dual resident deemed non-resident for the purposes of the treaty, would still be attributed income of a Transferor Trust as the income would be deemed income of the transferor, not actual income. Whilst he might find support for that view by virtue of the High Court denial of special leave from the decision in *Russell v FC of T* [2011] FCAFC 10, the Canadian decision of *The Queen v Sommerer* 2012 FCA 207 is more reasoned in its approach, and is to be preferred.[149]

The first tier of the tie-breaker i.e. "permanent home" in Malaysia and no "permanent home" in Australia, then together with the fact that he doesn't need to be in Malaysia for all of the 183 days in the first calendar year he moves there, as he can travel on business (in the employ of his

[148] So the argument would run, attributed income is "a purely notional sum", rather than actual income of the attributed taxpayer: there is authority for this proposition in the UK Court of Appeal decision of *Bricom Holdings Ltd v CIR* [1997] EWCA Civ 2193, although the that case is not referred to on the ATO website nor the argument recorded anywhere on the ATO website. This is in contrast to actual income of a taxpayer whose character is recast by the domestic law of the source country.

[149] see "Russell's case, Sommerer's case, and CFC Treaty Override", 24 July, 2012 at: http://robertgordontax.com/documents/articles/Russell_'s case, Sommerer_'s case, and CFC Treaty Override.pdf

own Labuan company), so as to be "temporarily absent"[150] and count those days as "in" Malaysia for the 183 day test[151], there is a lot more flexibility in moving to Malaysia to achieve the overall objectives than available with other countries[152].

APPENDIX

INDIVIDUAL RESIDENCE

Australian Tax Residence

Section 6(1) of the 1936 Act defines Australian residents as it relates to individuals as follows:

'"resident" or "resident of Australia" means -

(a) a person ... 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 member, spouse or child under 18 of a member of certain Commonwealth public service superannuation funds]' (underlining added)

As the specific tests widen the concept of "residence" beyond whether a person "resides" in Australia in a particular year of income, it only becomes necessary to consider the specific tests if the individual does not "reside" in Australia in the ordinary meaning of that word, in a particular year of income.

It will be observed that whether a person's residence will be taken into account in deciding their domicile, the reverse is also true. That is, a person's domicile is taken into account in the first specific test of tax residency.

As noted above, there is a wide-spread myth that leaving Australia for as short a period as two years, will necessarily suffice to become a non-resident for tax purposes. This has arisen due to para 25 of IT 2650 which actually only says that an absence of 2 years "would generally be

[150] As to which concept the UK cases should be relevant: *Re Young* (1875) 1 TC 57, *Rogers v Inland Revenue* (1879) 1 TC 225, *Reed v Clark* (1985) 58 TC 528, *Shepherd v IRC* [2006] STC 1821, *Barrett v Revenue & Customs* (2007) UKSPC SPC00639, *Revenue & Customs v Grace* [2008] EWHC 2708 (Ch). Also see the Australian case previously referred to: *FC of T v Jenkins* 82 ATC 4098 at 4101

[151] s7(1)(b)(i) of the Income Tax Act 1967

[152] For seriously wealthy Australians who are not UK domiciled, the UK represents a tax haven for unremitted foreign source investment income, particularly where such income is retained in an offshore "entity".

regarded by this Office as a substantial period for the purpose of a taxpayer's stay in another country".

Australian cases decided after IT 2650 issued and before the recent bout of cases starting in 2012

AAT Case 8892 (1993) 27 ATR 1136; Case 11/94 ATC 174 supports the general view taken in Ruling IT 2650. Residency in this regard is, as indicated in Ruling IT 2650, a question of fact, and a mere long absence (3 ½ years in this case) is not enough to divest oneself of resident status. The rule of thumb that an absence of 2 years or more is indicative of non-resident status (see Ruling IT 2650) should not be adopted as a matter of routine. In all cases, all factors must be considered. Finally, notwithstanding all the discussion on this issue, it must be acknowledged that an absence that is for a fixed and definite period only is a strong indicative factor supporting the conclusion that residency status has been retained even if it is a long-term contract e.g. 3 years.

In *AAT Case 12,551* (1998) 37 ATR 1263 the AAT decided that a physiotherapist did not cease to be a resident of Australia at any time during her lengthy stay overseas on a working holiday. She had not in their view, established a permanent place of abode outside Australia, essentially because she did not put down "roots" in any of the places where she worked.

In *Re Wessling and FCT* [2002] AATA 670; 50 ATR 1187, the taxpayer moved to Fiji wither husband who had been appointed principal of a school for 3 years. The taxpayer took special leave from her job, the family home was sold, and their belongings were put into storage. The AAT decided she had made her home in Fiji, even if not indefinitely, and therefore her permanent place of abode was outside Australia.

In *Re Shand and FCT* [2003] AATA 279; 52 ATR 1098 a Canadian who lived in Australia for almost 20 years, and then spent the majority of the next 5 years working overseas, predominately in Canada and Kuwait. The years in dispute where 1995 and 1996, in which the taxpayer working in Kuwait. It was decided by the AAT that he did not have a permanent place of abode outside Australia in 1995 and 1996:

> 18. 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. [*It should be noted that Mr Shand did not in fact have a business in Kuwait, but was an employee. See decision at [7[15]] that he had no shares in his employer, and at [7[98]] although he had some options*]
>
> 19. ... The El-Hoss apartment in Kuwait was a temporary or transitory place of abode ...

It is noted that Mr Shand became an Australian citizen at [7(24)]. Mr Shand regarded Kuwait as a "terrible place to live" at [7(63)]. Mr Shand was found to have a domicile of choice in Australia at [17(21)].

General Test – "resides"

The main text dealt with the common law concept of "resides". In relation to the facts in *Glyn's* case, Mr Glyn was a Jewish man who honoured most of the Jewish traditions. In 1993, he purchased a house with his wife in London. On the 5 April 2005, he and his wife departed to live in Monaco, in an apartment that they had acquired. Although the decision to emigrate was influenced by tax considerations, it was also in part to ensure a complete break from his former business life. Between April 2005 and May 2010, he spent approximately 200 days per year in Monaco. In the 2005/2006 year, he made 22 visits to the UK and spent approximately 65 days of the year there, staying (almost) every time at the house he owned. In the same year, he also spent approximately 65 days on foreign holidays. His visits to the UK were for various purposes, which were all non-essential. He never felt "at home" on these short visits. He saw his children and his friends much less frequently than when he lived permanently in London. He applied for a resident's parking permit and confirmed in that application that he was a resident in the UK. He retained the house in London because he knew that at some point he and his wife would return to live in London. In 2009, his daughter gave birth in London. His wife returned to London soon after. In May 2010, the taxpayer returned to living in London with his wife. It was found that Mr Glyn was not a UK resident in the 2005/2006 tax year.

It was found that Mr Glyn had acquired a habitual abode in Monaco for the settled purpose of living the life, accompanied by his wife, of a relatively rich man, enjoying the relaxation, the walking and swimming, and the countless attractions that Monaco offered. He demonstrated that he had substantially loosened his ties with family, friends and his business life in London.

All of the Australian cases on individual's tax residence deal with people who are mere employees rather than owners of businesses, usually living in temporary housing provided by their employer.

First Specific Test - domiciled but permanent place of abode outside Australia

Domicile

The first of the three specific tests refers to the domicile of the individual[153].

Permanent Place of Abode

The most relevant expression of opinion by the Commissioner of Taxation is contained in Income Taxation Ruling IT 2650, which is headed "Residency – Permanent Place of Abode Outside Australia" (underlining added). That ruling is essentially directed at the question of whether persons absent from Australia for particular periods may become non residents of Australia during the period of absence.

[153] As to the question of domicile, see the discussion at [8-10] and [21] of IT 2650. Also see *Iyengar* at [87] -[101].

Second Specific Test – in more than 183-days but usual place of abode outside Australia

After the issue of IT 2650 and TR98/17, a further case was decided: *FC of T v Executors of The Estate of Subrahmanyam* 2002 ATC 4001 (Full Federal Court), and on remission to the AAT, 2002 ATC 2303. This case didn't deal with domicile, and as it was fought on the basis of the second test. It appears that the evidence was always the taxpayer had intended to return to Singapore, and so it appears to have been conceded by the ATO that she was domiciled in Singapore.

In this case, the deceased, who was a citizen of Singapore, had been in Australia for almost 4 years, essentially for medical treatment, and her lifestyle had been severely restricted by the health problems. She had closed her medical practice in Singapore, sold her house and transferred the proceeds of sale to Australia. However, she had left valued possessions in Singapore and maintained her Singapore medical registration and travelled back there on a few occasions. Ultimately on remission to the AAT, she was found not to have a usual place of abode outside Australia.

More recent cases

The question of residence of individuals has come into questions several times recently in reported decisions, after many years of little activity[154]. The recent cases have not moved past the AAT. More cases would be expected due to the substantive repeal of s23AG, which until 30 June 2009 provided that foreign source employment income was non-assessable non-exempt in relation to foreign continuous service of at least 90 days (where tax was paid at source). Until it was repealed, for many there was not such a great need to argue that the taxpayer had ceased to reside in Australia, although the effect of s23AG was to provide for an "exemption with progression"[155].

Middle East

The cases have often involved employees going to work as employees in the Middle East and staying in employer provided accommodation. The result has usually been that whatever their status in the Middle Eastern country[156], they would continue to be regarded as ordinarily residing in Australia[157]. As Australia has no double tax treaties with Middle Eastern countries, the potential dual residence was not resolved by a treaty: *Iyengar*[158] *and FCT* [2011] AATA 856;

[154] "Establishing Residence for Global Villagers" Ian Stanley , International Masterclass TI NSW Div 18 Sept 2013. "Establishing Residence in the Global Village", Tony Underhill et al, TI Nat Conv. 26-28 March 2014.

[155] so that income other than that the subject of s23AG was taxed at a rate which took into account the s23AG income i.e. the s23AG income pushed the other income into a higher tax bracket than would otherwise apply.

[156] Which would often have no or a very low income tax. Section 23AG would usually only be available if some tax was paid in the country of source.

[157] And all were Australian domiciles who generally could not establish a "permanent place of abode" outside Australia.

[158] Mr Iyengar left Perth *i*n May 2007 to move to Dubai and later Doha to work as a Site Engineering Manager pursuant to a two year contract which contained an option to extend the contract for one year. Since 2003, Mr Iyengar had jointly owned a house in Winthrop, Western Australia, with his wife. Except for the periods he had been absent from Australia, Mr Iyengar had resided at the Winthrop home and he

S*neddon*[159] *and FCT* [2012] AATA 516; *Boer and FCT* [2012] AATA 574; *Sully and FCT* [2012] AATA 582.

The only case involving the Middle East in which the taxpayer was successful was one in which there was evidence that the taxpayer intended on living in New Zealand when his employment in Abu Dhabi finished; that he had initially occupied employer provided accommodation but subsequently found more permanent accommodation, and that he did not intend to re-occupy a house in Australia which his son had made his home: *Mayhew and FCT* [2013] AATA 130.

Tie Breaker

Australia's double tax treaties generally have a "tie breaker" for individuals that provides as its first test, whether the individual has a "permanent home" in one country and not the other. Where an individual has a choice and wishes to be more certain that they will be treated as a non-resident of Australia, they should sell their Australian home, or at least let it out for a number of years so that it is not available to them during that period[160]. At the same time, they should buy or at least take a lease for a number of years of accommodation in a treaty country[161]. Whilst a number of recent cases have involved DTA countries, generally the taxpayer's accommodation in those countries, and a remaining home in Australia, did not trigger

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regarded it as the "family home". Mr Iyengar left Perth with the intention of returning upon the completion of his contract. He did not lease or purchase a property in Dubai. The taxpayer was held to be a resident of Australia for the 2008 and 2009 tax years. Mr Iyengar maintained a place of residence in Australia which at all times remained his "family home". He maintained an intention to return to Australia when his contract of temporary employment ended. Mr Iyengar did not lease or purchase a property in Dubai (or later Doha), he did not purchase any substantial items of personal property whilst abroad and he returned to Australia upon completion of the contract. Mr Iyengar was a mere employee, working abroad, pursuant to his contract, for a finite period of time. Mr Iyengar was an Australian citizen. Mr Iyengar left many of his personal possessions in Australia, including two motor vehicles, furniture, appliances, clothing and other items.

[159] Mr Sneddon who was born in Australia. purchased a property in 2007 in Western Australia. He was offered employment as a health and safety supervisor in Qatar. He was issued with a UAE residence permit and a work visa by the State of Qatar. He left several of his personal items, including a car, at his WA property when he left for Qatar. In Qatar, he lived in an apartment that was rented by Fluor, the company that employed him. During the 2008/2009 year, he returned to Australia on three occasions for a total of approximately seven and a half weeks. On 1 August 2010, he returned to Australia for over 12 months. Mr Sneddon was held to be an Australian resident for the income year ended 30 June 2009. Mr Sneddon left personal items at the property he owned in Australia, including various household items and a car. More than half of his earnings were used to cover expenses in Australia. Mr Sneddon was paid in Australian dollars. Mr Sneddon was born in Australia and is an Australian citizen. Mr Sneddon's main reason to go to Qatar was for work that was expected to be completed by 31 July 2010. He had no promised future employment in Qatar after that date and was working as an employee in Qatar. All of Mr Sneddon's personal ties were in Australia in the relevant year, and his only tie to Qatar was his employment.

[160] See ATO ID 2012/93 in relation to dual residence resolved in favor of Malaysia. Letting out on a periodic tenancy rather than for a fixed term worked against the taxpayer in *Disputant Resident v CIR(NZ)* [2013] NZTRA 10 at [40]; [63].

[161] Where they would spend sufficient time to be treated as a resident for the purposes of that country

the "tie breaker" in favor of the foreign country: *Murray*[162] *and FCT (No 3)* [2012] AATA 557; *AAT Case 2012/4009* [2013] AATA 394.

In *Mynott and FCT* [2011] AATA 539, the taxpayer was able to establish that he was a resident of the Philippines and not Australia, and did not rely on the "tie breaker" even though the Philippines is a DTA country. He established that he was a resident of the Philippines and not a resident of Australia in the 1999, 2000, 2001 and 2002 tax years.

Mr Mynott filled out his immigration passenger cards to indicate that he was an Australian resident, but little weight was given to this evidence, because the information was provided in a non-taxation context[163].

In a different case called Murray: *Murray v Commissioner of Taxation* [2013] AATA 780 (1 November 2013), the taxpayer (David Murray) decided to leave Australia in 2006 to live with his then partner in Thailand[164]. The taxpayer was found to be a non-resident in the 2009, 2010 and 2011 income years.

When completing his immigration cards, Mr Murray indicated that he was an Australian resident and he received Medicare benefits which were only payable in respect of services rendered to an Australian resident. The tribunal did not give this evidence any great weight, as he was not turning his mind to the notion of residence according to ordinary concepts when completing the immigration forms, and was unaware that the Medicare benefits were only available to Australian residents.

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[162] Murray raised the "tie breaker" argument under the Singapore DTA too late, and so was not allowed to run it. However, his family trust maintained a residence in which he stayed when in Australia. In *Pillay and FC T* [2013] AATA 447 the taxpayer maintained houses in Australia and Bali, but worked in East Timor. He did not argue that he was a resident of Indonesia, but if he did, as he had houses in both countries, the first tie breaker in the Indonesian DTA would not have helped him.

[163] Mr Mynott, left Australia in 1997 to work in the United Kingdom. In 1998, he was employed in Malaysia. He entered a domestic relationship with Ms Rose Punzalan, who had three children living in Manila. Ms Punzalan moved back to Manila permanently and her and Mr Mynott began renting an apartment in Manila in December 1998, which Mr Mynott used as his base between his various work engagements abroad. He returned to live in Australia on 30 January 2002 after his relationship with Ms Punzalan came to an end. Between 1997 and 2002, Mr Mynott returned to Australia approximately three times per year, with each visit lasting approximately three weeks. Mr Mynott was working abroad throughout the relevant period. Mr Mynott was merely working abroad as an employee for an unrelated party. Mr Mynott maintained an Australian bank account into which his overseas earnings were deposited. His Australian bank accounts were only for living expenses and sending money back to the Philippines. Mr Mynott used the Philippines as his base, so this was his permanent place of abode.

[164] After his relationship broke down, he decided to live in Bali and rented a house in Sanur. In October 2008 he commenced a relationship with "Ketut" who is now his wife. In early 2009 Mr Murray acquired a sub-lease of the premises and he obtained the right to reside in Indonesia as a retired person. He made a number of trips back to Australia between 2008 and 2010, staying with friends in Darwin. His trips lasted between four and 83 days. He came to Australia, accompanied by Ketut, in February 2010 and in June 2010 Mr Murray was convicted and sentenced to 18 months imprisonment in Australia. Mr Murray was residing in an established residence in Bali. It was the place where he intended to return after his visits to Australia and it was where he had his substantial assets. Mr Murray made frequent, lengthy visits to Australia. Mr Murray was in Australia for 191 days in a tax year. Mr Murray's trips lasted for instance, 69 days in one trip in 2009.

In relation to residence, firstly, the AAT decision in *Murray and FCT (No 3)* (not David Murray) was appealed direct to the Full Federal Court, under the taxpayer's real name, *Mulherin v FC of T* [2013] FCAFC 115, which dismissed the taxpayer's appeal on the basis that it was incompetent, as it did not raised any issue of law, but only of fact. The taxpayer came and went regularly from Australia for work purposes. In relation to his raising the tie breaker argument too late, the Full Federal Court said the AAT did not make an error of law in refusing him leave to raise that point.

In Pillay v Commissioner of Taxation [2013] AATA 447 (28 June 2013), Dr Pillay was employed as a doctor in East Timor. He stayed between 9 and 11 months of the year there, with the remainder of his time spent in Australia and Bali. Dr Pillay was found to be an Australian resident for the 2010, 2011 and 2012 tax years[165].

In *Re Nordern and FCT* [2013] AATA 271 the taxpayer worked in China, Malaysia and PNG (all treaty countries) for 200 days in the 2011 tax year, but did not become a tax resident of any of them, and so the "tie breaker" was irrelevant.

In ZKBN and Commissioner of Taxation [2013] AATA 604 the taxpayer failed to persuade the AAT that he was a non-resident of Australian in the 2007 and 2008 tax years and placed some reliance on the way the taxpayer filed out his immigration cards when entering and leaving Australia. In contrast, in the *David Murray* and *Mynott* cases, the way the immigration cards were filled out was not regarded as important.

The cases of Browne and Commissioner of Taxation [2013] AATA 866; and *Guissouma and Commissioner of Taxation* [2013] AATA 875 involved persons from Ireland and France that had come to Australia for about one year, and in both cases they were found to be residents of Australia, which may have been a desirable outcome for them if they did not have foreign source income and they wanted the benefit of graduated rates of tax in Australia, rather than the flat 32.5% that currently applies to non-residents.

Resident nowhere?

From press reports, it appears that the actor Paul Hogan, has an argument with the ATO, where he has asserted that in the relevant years, he was not a tax resident of any country[166]. Clearly the ATO prefer the argument that he was an Australian tax resident[167].

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[165] When in East Timor, he stayed in a two-bedroom apartment which was supplied by his employer. He and his wife had purchased a 55-year lease on a property in Bali which they called home. Dr Pillay had Australian bank accounts which he used to meet his living expenses. He is an Australian citizen and was present in Australia for between 6 and 8 weeks in each of the relevant years. Dr Pillay did not regard East Timor as home and his connection with East Timor was based almost entirely on his employment relationship. After his employment ended, he intended to divide his time between Bali and Australia. Dr Pillay was an Australian citizen. Dr Pillay and his wife owned a property in Australia which is described as the "family home". He kept a wardrobe of clothing at this house, and it was only occupied during the few weeks of the year when Dr Pillay was visiting Australia.

[166] e.g. "Crime body suspects Hogan of travel sham", The Age, 22 Aug, 2008

[167] Due to largely ineffective suppression orders, the first reported decision that refers to Hogan by name is *Hogan v ACC (No.4)* [2008] FCA 1971 (22 Dec 2008). Whilst the ACC abandoned their claim that certain documents were not subject to legal professional privilege based on the crime/fraud exception, there is

It has been suggested that the cruise liner, "The World" reputedly promotes the possibility of ceasing to be a tax resident anywhere, by selling up in the home jurisdiction, and buying a suite on the liner, which will then cruise the world endlessly[168]!

This idea might not be far fetched. On remission to the AAT in *FC of T v Executors of The Estate of Subrahmanyam*, the AAT referred (at p445) to the Commonwealth Taxation Board of Review in *Case No. 56*, (1946) 15 CTBR 443:

> The taxpayer took up an appointment on board a ship and placed all of his personal belongings on board with the intention of living on it and without any definite intention of ever returning to Australia to live. The ship was in Australia for short periods during each of the tax years under consideration. The taxpayer had not abandoned his domicile in Australia. Therefore, in view of paragraph (a)(i) of the definition, he was a resident and so subject to taxation unless his permanent place of abode was outside Australia.
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> 28. Mr Gibson considered the dictionary meanings given to ``abode'' and ``place'' and formed the view that, in one of its senses, a ``place of abode'' was a place of habitation or home. The ship was the taxpayer's place of abode because it was the place where he slept, ate, worked and had his recreation. It was immaterial where the ship was moored. It was his permanent place of abode because he was residing on it for an indefinite time and his presence was not merely fleeting. Mr Gibson also considered that the expression ``place of abode'' might be given a broader interpretation and that:
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> > ``... meaning may be a `person's home or dwelling-house or other habitation or the village, town, city, district, county, country, or other part of the world in which a person has his home or dwelling-house or other habitation or in which he habitually resides'. In the broader of these senses the taxpayer's `abode' at the material times was his ship or on his ship, and his place of abode was the particular part of the world where the ship happened to be at any given time. Even applying that sense it could, I think, be held that the tax-payer's permanent place of abode was outside Australia.''

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still a dispute about the suppression of a document prepared by the applicant referring to inferences that could be drawn from the privileged documents: see *Hogan v ACC* [2009] FCAFC 71, appeal heard by the High Court on 4 Feb 2010. In the light that the legal professional privilege claim was abandoned by the ACC, it is difficult to see why the press reports that the outcome of the High Court appeal is relevant to whether the ACC will seek to charge Hogan e.g. "Crime body close to charging Hogan and Cornell", The Age 3 Feb, 2010.

[168] From Wikipedia entry: "The World" (cruise ship)

*"*The World*"* is a floating residential community owned by its residents. The residents, currently from 40 different countries, live on board as the ship slowly circumnavigates the globe — staying in most ports from 2 to 5 days. Some residents live onboard full time while others visit their floating home periodically throughout the year.

From "The World" website (www.aboardtheworld.com):

…*The World* opens a vast amount of opportunity to travel the world in an exclusive community as either a Resident or vacationing Guest. With 165 private residences located aboard, many Residents call *The World* home on a consistent basis while others open their doors temporarily for short term rentals that allows others a unique vacation experience unlike any other.

DRAFTING FOREIGN WILLS OR SEPARATE WILLS FOR EACH JURISDICTION?

The competing considerations usually involve, a foreign trust having the benefit of having local executors & trustees; the hastened administration in uncomplicated jurisdictions not being restrained by complicated situations in other jurisdictions, and the isolation of insolvent estates (usually due to local taxes) from solvent estates in other jurisdictions. However, for my part, I think it very hard to generalize, and much depends on the types of assets and the jurisdictions they are in[169].

CIVIL LAW STRUCTURES

Whether advising Australians about suitable structures offshore, or dealing with offshore structures already in place when foreigners come to Australia, it is necessary to be aware of some of the civil law entities that may be encountered.

These entities have characteristics of both companies and trusts. Generally they will have legal personality, and exist in perpetuity, but do not have shareholders or members, and may exist for a purpose, or for persons, or both[170]. Generally, the founder will not have a property interest in such entities, and so their succession will not be governed by the testator's will, but will be dealt with in the documentation of the civil law entity itself.

The most well known of the civil law entities are the stiftung (foundation) and the anstalt (establishment)[171], created under the law of Lichtenstein.

The stiftung is similar in many respects to a Purpose Trust[172] although it is incorporated. The stiftung is managed by a Council of Members, which most often is originally appointed by the Founder. At least one person on the Council must be resident in Liechtenstein. The stiftung probably have their greatest use is not in holding significant tangible assets, but rather as acting as the holder of shares in traditional domestic or offshore entities that are used as management companies.

The Liechtenstein anstalt is an entity, which has no members, participants or shareholders, and is a sort of hybrid between a corporation and a stiftung. An anstalt can have beneficiaries. The principal practical difference between an anstalt and a stiftung is that an anstalt can conduct all kinds of business activities[173].

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[169] This topic was dealt with extensively at the Lexis Nexis 6th Annual Wills, Succession and Estate Planning Conference (Vic), by Barry Fry, in his paper: "Looking Beyond Jurisdictional Boundaries in Will Drafting and Estate Planning", particularly at [13.1]-[13.10]. Also see Bernie O'Sullivan, "Estate & Business Succession Planning", TIA (2008) Ch 6; and Kessler & Flynn *op cit* at [15.75].

[170] See generally, Andreas Schurti, Chapter on Liechtenstein in "Offshore Trusts", Centre for International Legal Studies, Salzburg, Kluwer (1995) at pp228-230.

[171] Also see CCH "International Offshore Financial Centres", (looseleaf) at [LIE1-035] & [1-036].

[172] HMRC TDSI mailshot 6- 17 May 2004 says for UK tax purposes, they will be treated as trusts. Also see "Beneficiaries of Trusts and Foundations", Philip Baker, Vol VII No 3 ITPA Journal (2007).

[173] HMRC TDSI mailshot 6- 17 May 2004 says for UK tax purposes, they will be treated as companies. The US has released a letter ruling AM2009-012 on 16 Oct 2009, which says that generally, a Liechtenstein anstalt will be treated as a business entity (corporate), whereas a Liechtenstein stiftung will be treated as a trust.

Foundations of the civil law type have also existed for some time in Austria, Cyprus, Italy, Finland, Germany, the Netherlands (Stichting), Netherlands Antilles, Spain, Sweden (Stiftelse), Switzerland, Panama (1975), and more recently in St Kitts (2003), Nevis (2004), Bahamas (2005), Anguilla (2006), Antigua and Barbuda (2006), Malta (2006), Jersey (2009), and Labuan, Malaysia (2010).

Memec Plc v IRC [1998] STC 754 dealt with the UK tax characterisation of a German silent partnership. The approach taken was to analyze the characteristics of the civil law entity, and to equate it as closely as possible to the common law entity that it most closely resembles[174].

Dreyfus v CIR [1929] 14 TC 560 held a French "Societe en Nom Collectif" (SNC), to be a company for UK tax purposes[175].

Ryall (Inspector of Taxes) v Du Bois Co Ltd [1933] 18 TC 431 held a German "Gesellschaft mit beschraenkter Haftung" (GmbH) to be a company for UK tax purposes[176].

The ATO has shown a marked reluctance to tackle this issue. As far as I can find they have not sought to deal in detail[177] with foreign civil law foundations[178]. In relation to Dutch stichtings, ATO ID 2007/42 reaches the conclusion they are trusts, based on *Harmer v FC of T* 89 ATC 5180. In relation to Anstalts, there is no ruling available but PS LA 2007/7 says at example 2, that an Anstalt "limited by shares", will be a company[179].

In Private Ruling 77367 the ATO conclude that a Dutch Co-OP is a corporate entity from which s23AJ dividends may be available[180]. They also note that a German Kommanditgesellschaft (German AG) referred to in ATO ID 2007/47, and a Delaware Revised Uniform Limited

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[174] As observed by Prof. Burns "Harmonization of Australian's Anti-Deferral Regimes", presented to IFA Melbourne, 12 June, 2007. Also see Dicey Morris and Collins *op cit* ¶ 30-010. *Memec* was applied in *Swift v Revenue & Customs* [2010] UKFTT 88 (TC), to find contrary to HMRC's long standing position, that a US LLC was transparent for UK tax purposes. The result was reversed on appeal: see sub nom *Revenue and Customs v Anson* [2013] EWCA Civ 63 again but still citing *Memec* as the leading authority.

[175] See particularly, pp 576-7. Tax Bulletin, Dec 2000 now treats an SNC as transparent for UK tax purposes.

[176] Which status it is also treated under Tax Bulletin, Dec 2000.

[177] By the issue of a public ruling i.e. Taxation Ruling or Determination. They seem to have argued for, and it was accepted by the taxpayer in the Australian case of *Mulherin v FC of T* [2013] FCAFC 115 at [25] that the Liechtenstein Foundation in that case was a trust (indeed an Australian resident trust), whereas in *The Queen v Sommerer* 2012 FCA 207 at [42]-[43] the Canadian Federal Court of Appeal doubted that the Austrian Foundation in that case was a trust (but rather was a company), but neither party wished to proceed on that basis.

[178] refer generally "The Private Foundations Handbook" M Grundy ed., ITPA, 2007.

[179] Whilst the conclusion is the same as HMRC, these days, most anstalts are not "limited by shares". The BOT identified the characterization of anstalts as an "urgent issue" in 2004, yet 10 years later nothing has been done, and the new government's recent announcement that they will not be proceeding with many of the previously announced measures, including reform of the anti-deferral measures, will presumably not cause resolution any time soon.

[180] As noted in "Foreign Entities- Characterisation and Treatment for Australian Tax Purposes", Watkins & Rodi, TIA NSW Div, International Tax Masterclass, 18 Sept 2008

Partnership[181] referred to in ATO ID 2008/80, are "foreign hybrid limited partnerships" under Div 830 of the 1997 Act[182].

The ATO reluctance to deal with foundations may be in the process of changing due to the US Senate investigation: "Tax Haven Banks and US Tax Compliance", which refers at page 49 to the Liechtenstein foundation alleged to be formed at the request of the Lowy family[183]. The ATO made a submission to the US Senate investigation[184]. Also see "Revealed: How the ATO got lucky with Frank Lowy", Financial Review, 25 July, 2008, and the reference to "unknown international sources" in *Case 25/95*, 95 ATC 263. That the issue has not gone away can be seen from an article in The Age, "Give Lowy no help, Tax Office warned US" (November 8, 2010).

Islamic Trusts

For the third of a Muslim's estate, which can be the subject of a will, the Islamic law recognizes that that part of the estate can be settled on an "Islamic trust".

Islamic law recognizes two types of quasi-trusts, the waqf al Ahli (family waqf), and the waqf al-Khayri (welfare waqf)[185].

DISCLAIMER

This paper does not constitute advice. It should not be relied on as such.

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[181] Even though the Delaware Limited Partnership is a body corporate.

[182] In ATO ID 2008/61 the conclusion is reached that an Irish CCF is a trust; in ATO ID 2006/149 that a Bermudan exempted limited partnership was a limited partnership but could not satisfy the requirements to be a "foreign hybrid limited partnership"; and in ATO ID 2006/91reached the conclusion that a Korean Japja Hoesa was a limited partnership but could not satisfy the requirements to be a "foreign hybrid limited partnership", and then changed their minds and concluded that it was a company in ATO ID 2010/27 and withdrew the earlier ruling.

[183] http://hsgac.senate.gov/public/_files/REPORTTaxHavenBanksJuly1708FINALwPatEliseChgs92608.pdf

[184] http://www.ato.gov.au/corporate/content.asp?doc=/content/00155700.htm, and has issued two Taxpayer Alerts, TA 2008/2 & TA2009/19.

[185] See "Sharia'a charitable 'trusts'", Gary Envis, STEP Journal, Nov 2008; For comment on drafting an Islamic Trust, see "Care and Consideration", Gary Envis, STEP Journal, Jan 2009