



[Home](#) | [Databases](#) | [WorldLII](#) | [Search](#) | [Feedback](#)

Federal Court of Australia - Full Court

You are here: [Austlii](#) >> [Databases](#) >> [Federal Court of Australia - Full Court](#) >> [2019](#) >> [\[2019\] FCAFC 29](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Context](#) | [No Context](#) | [Help](#)

← Harding → v Commissioner of Taxation [2019] FCAFC 29 (22 February 2019)

Last Updated: 25 February 2019

FEDERAL COURT OF AUSTRALIA

← Harding → v Commissioner of Taxation [2019] FCAFC 29

Appeal from: ← **Harding** → v Commissioner of Taxation [2018] FCA 837

File number: QUD 442 of 2018

Judges: [LOGAN, DAVIES AND STEWARD JJ](#)

Date of judgment: 22 February 2019

Catchwords: **TAXATION** – residency of taxpayer – permanent place of abode – where primary judge found that the taxpayer was a “resident or resident of Australia” as defined in [s 6](#) of the [Income Tax Assessment Act 1936](#) (Cth) – where primary judge found that rented accommodation for a temporary purpose did not constitute a “permanent place of abode” – whether “permanent place of abode” should be construed by reference to a specific permanent dwelling or a geographic location

TAXATION – ordinary meaning of “resides” – where primary judge found that the taxpayer’s absence from Australia and his intention not to return were sufficient to terminate his residency in Australia – whether the taxpayer was a resident of Australia

TAXATION – review by the Court – where taxation provision is conditioned by the Commissioner’s satisfaction – whether Court can go beyond identifying an error of law in the Commissioner’s state of satisfaction

Legislation: [Domicile Act 1982](#) (Cth) [s 10](#)
[Income Tax Assessment Act 1922](#) (Cth)
[Income Tax Assessment Act 1930](#) (Cth)
[Income Tax Assessment Act 1936](#) (Cth) [s 6](#)
[Taxation Administration Act 1953](#) (Cth) [s 14ZZ](#)
 Explanatory Notes, Income Tax Assessment Bill 1930 (Cth)

Cases cited: [Applegate v Commissioner of Taxation \[1978\] 1 NSWLR 126](#)
[Avon Downs Pty Ltd v Commissioner of Taxation \[1949\] HCA 26; \(1949\) 78 CLR 353](#)
[Commissioner of Taxation v Futuris Corporation Ltd \[2008\] HCA 32; \(2008\) 237 CLR 146](#)
[Commissioner of Taxation v Miller \[1946\] HCA 23; \(1946\) 73 CLR 93](#)
[Deputy Commissioner of Taxation v Brown \[1958\] HCA 2; \(1958\) 100 CLR 32](#)
[Donaldson v M'Clure](#) (1857) 20 D. 307
[Federal Commissioner of Taxation v Applegate](#) (1979) 38 FLR 1

Federal Commissioner of Taxation v Jenkins (1982) [59 FLR 467](#)
Ferrier-Watson v McElrath [2000] [FamCA 219](#); (2000) [155 FLR 311](#)
Giris Pty Ltd v Commissioner of Taxation [1969] [HCA 5](#); (1969) [119 CLR 365](#)
Hafza v Director-General of Social Security (1985) [1985] [FCA 164](#); [6 FCR 444](#)
Inland Revenue Commissioners v Lysaght [1928] [AC 234](#)
Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation [1975] [HCA 5](#); (1975) [132 CLR 535](#)
Levene v Inland Revenue Commissioners [1928] [UKHL 1](#); [1928] [AC 217](#)
MacCormick v Commissioner of Taxation [1984] [HCA 20](#); (1984) [158 CLR 622](#)
R v Braithwaite [1918] [2 KB 319](#)
R v Bundy [1977] [1 WLR 914](#)
R v Hammond [1852] [EngR 108](#); (1852) [117 ER 1477](#)
R v Webb [1896] [1 QB 487](#)
Re Dempsey and Federal Commissioner of Taxation (2014) [98 ATR 698](#)
Russell v Russell [1935] [SASRp 27](#); [1935] [SASR 85](#)
Terrassin v Terrassin (1968) [14 FLR 151](#)
Winans v Attorney-General [1904] [AC 287](#)
W R Carpenter Holdings Pty Ltd v Commissioner of Taxation [2006] [FCA 1252](#); [63 ATR 577](#)

Date of hearing: 21 November 2018

Registry: Queensland

Division: General Division

National Practice Area: Taxation

Category: Catchwords

Number of paragraphs: 65

Counsel for the Appellant: Mr S Couper QC with Mr M May

Solicitor for the Appellant: Cooper Grace Ward Lawyers

Counsel for the Respondent: Ms R Treston QC with Mr D Butler

Solicitor for the Respondent: ATO Dispute Resolution

ORDERS

QUD 442 of 2018

BETWEEN: **GLENN GERALD**  **HARDING** 
Appellant

AND: **COMMISSIONER OF TAXATION**
Respondent

JUDGES: **LOGAN, DAVIES AND STEWARD JJ**

DATE OF ORDER: **22 FEBRUARY 2019**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made on 8 June 2018 be set aside.
3. In lieu thereof, it be ordered that:

- (a) the appellant's appeal against the respondent's objection decision dated 28 June 2017 in respect of the year of income ended 30 June 2011 be allowed.
 - (b) in lieu of that objection decision, the appellant's objection against the Amended Assessment which issued on 11 December 2015 be allowed.
 - (c) the matter be remitted to the respondent for the issuing of a further amended assessment on the footing that the appellant was not, in that income year, a resident of Australia.
4. As to costs, within 7 days of this order, the parties file agreed orders as to costs or, failing agreement, their respective submissions of not more than 3 pages concerning the issue of costs. Pending the filing of such agreed orders or, as the case may be, submissions, costs are reserved.

Note: Entry of orders is dealt with in [Rule 39.32](#) of the [Federal Court Rules 2011](#).

REASONS FOR JUDGMENT

LOGAN J:

1. I have had the privilege of reading in draft the reasons for judgment of Davies and Steward JJ (**joint judgment**).
2. I agree with the orders which their Honours propose in relation to the disposition of the appeal, including in that regard the respondent Commissioner of Taxation's notice of contention. Subject to what follows, I also agree with their reasons for proposing those orders. I gratefully adopt the accounts of the facts found in the joint judgment and also the abbreviations there employed.
3. When this Court exercises the original jurisdiction conferred on it by [s 14ZZ](#) of the [Taxation Administration Act 1953](#) (Cth) to hear and determine an "appeal" against a taxation objection decision, it exercises a jurisdiction which, necessarily, is more extensive than determining on judicial review whether the objection decision is attended with jurisdictional error. The qualification, "necessarily", flows from the basal constitutional proposition that a right of recourse to an exercise of the judicial power of the Commonwealth so as to contest whether the criteria giving rise to an alleged taxation liability are met is one feature which, at the Federal level, distinguishes a valid law with respect to taxation from an invalid arbitrary exaction: *Deputy Commissioner of Taxation v Brown* [1958] HCA 2; (1958) 100 CLR 32 at 40; *Giris Pty Ltd v Commissioner of Taxation* [1969] HCA 5; (1969) 119 CLR 365 at 378-379; *MacCormick v Commissioner of Taxation* [1984] HCA 20; (1984) 158 CLR 622; *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; (2008) 237 CLR 146 at [9] – [10].
4. This feature, necessary for the constitutional validity of a law with respect to taxation is not expressly referred to in *Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* [1975] HCA 5; (1975) 132 CLR 535, where Gibbs J discussed a taxation liability criterion which was conditioned by the Commissioner's satisfaction. However, in my respectful view, this feature explains why, as Gibbs J allowed at 568, once error on the part of the Commissioner in being satisfied (or not satisfied) of the kind identified by Dixon J in *Avon Downs Pty Ltd v Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, at 360 has been established, "it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied by reference to all the material before the Court". The court's so doing prevents arbitrary exaction by the Commissioner, who is an officer of the Executive. A like view of the role of the court on a taxation appeal in relation to a satisfaction based liability criterion is evident in the judgment of Stephen J in that case, at 576.
5. One of the several further or alternative criteria by which a person may, by definition, be a "resident" or a "resident of Australia" is if that person is someone, "whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia": para (a)(i) of the definition in [s 6](#) of the [Income Tax Assessment Act 1936](#) (Cth). The qualification found in this criterion is, as explained in the joint judgment, an exemplar of a satisfaction based criterion. That it has this quality and that the Commissioner evidently adopted a too narrow conception of "permanent place of abode" means that, quite apart from the way in which the parties chose to conduct the determination of this issue in the original jurisdiction, it was always open to the learned primary judge to decide for himself, on the evidence before him, whether the Commissioner should have been satisfied that Mr  **Harding** s permanent place of abode was outside Australia during the 2011 income year.
6. As it happens, for reasons set out in the joint judgment, the learned primary judge adopted a too narrow conception of what may constitute a "permanent place of abode". On the findings of fact which his Honour made, which include his settled purpose to live in Bahrain, commuting from there to work in Saudi Arabia, Mr  **Harding** s permanent place of abode was in Bahrain. That, as it happened, he was living, temporarily, in an apartment in Bahrain was entirely consistent with that settled purpose and a conclusion that his permanent place of abode was in Bahrain. That is because the style of accommodation which he chose was completely congruent with the planned arrival in Bahrain of his wife and family and their then taking up there accommodation suited to the needs of the family.
7. Because I was a member of the Tribunal in *Re Dempsey and Federal Commissioner of Taxation* (2014) 98 ATR 698 (referred to by the learned primary judge at [47]) and the learned primary judge, before appointment, appeared for the Commissioner in that case, I make the following further observations with some diffidence. In that case, at [101], Deputy President Hack SC, Senior Member Kenny and I stated, in relation to the determination for the purposes of the [s 6](#) definition of where a person resides by reference to check lists of factors found relevant in earlier cases, "[h]owever useful such checklists may be, they are no substitute for the text of the statute and the recollection that ultimate appellate authority dictates that the word "resides" be construed and applied to the facts according to its ordinary meaning". I adhere to that view. Indeed, the present case may well, with respect, offer an example of a risk of seizing upon a particular fact which one might find in a "check list", temporary accommodation, to the detriment of applying the ordinary meaning of, in this instance, that part of the definition found in para (a)(i). In some contexts, occupancy in a particular place abroad of temporary accommodation may well be antithetical to satisfaction that a person's "permanent place of abode" is outside Australia. In the overall context of the facts found by the primary judge, occupancy of temporary accommodation is congruent with satisfaction that, in the 2011 income year, Mr  **Harding** s "permanent place of abode" was outside Australia. To adapt an idiom, to focus on whether a particular tree (temporary accommodation) is present runs the risk of losing sight of the fact that this tree forms part of a wider wood (permanent place of abode outside Australia).
8. Once the ambit of permanent place of abode outside Australia is understood, there is no great mystique about this aspect of taxation law, only the answering of a question of fact and degree in the overall circumstances of a given case. In the answering of

that question, it is of cardinal importance not to elevate into matters of principle in a later case particular facts found decisive in the different circumstances of an earlier case.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 22 February 2019

REASONS FOR JUDGMENT

DAVIES AND STEWARD JJ:

9. By agreement between the parties, the question for determination in this appeal is whether Mr **Harding** was a resident of Australia in the income year ended 30 June 2011. Below, the learned primary judge found that he was a “resident” of Australia, as that term is defined in [s 6](#) of the [Income Tax Assessment Act 1936](#) (Cth) (the “1936 Act”). That was because he was not found to have a permanent place of abode outside Australia. His actual abode was only temporary accommodation. This proceeding is an appeal from that decision. By Notice of Contention, the respondent (the “Commissioner”) contends that Mr **Harding** also resided in Australia in that year of income.

Applicable Statutory Provision

10. Section 6 of the 1936 Act relevantly defines a “resident or resident of Australia” in the following way:

resident or resident of Australia means:

(a) a person, other than a company, who resides in Australia and includes a person:

- (i) whose domicile is in Australia, unless the Commissioner is satisfied that the person’s 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 the person’s usual place of abode is outside Australia and that the person does not intend to take up residence in Australia ...

The definition is important. If Mr **Harding** was a resident of Australia in 2011, he will be required to pay Australian income tax in respect of the salary paid to him from his job in Saudi Arabia.

Facts

11. Neither party disputed any of the facts found by the learned primary judge, however, each emphasised different facts, or gave certain facts more or less weight. The facts found below were expressed with admirable lucidity. It is necessary to reproduce them in full because some of the issues in this matter are factual in nature. The facts found were as follows:
8. Mr **Harding** is an Australian national having been born here on 11 July 1965. He is an Australian citizen and holds an Australian passport. He also holds a British passport.
 9. It appears that Mr **Harding** started his working life as an aircraft engineer with BAE Systems. He left Australia at a relatively young age and was married to his first wife (Ms [Tracy] **Harding** – a British national) on 20 July 1990 in the United Kingdom. In December 1990, Mr **Harding**’s employment with BAE Systems caused him and his wife to move to Khamis Mushayt in the south-west of Saudi Arabia. Mr and Mrs **Harding** lived there for about 7 years after which they moved to Riyadh. For all of that time Mr **Harding** continued his employment with BAE Systems. During this period Mr and Mrs **Harding** had two children and on each occasion Mrs **Harding** returned to the United Kingdom for their birth and only returned once they were about six weeks old.
 10. The uncontested evidence before the Court is that, Mr and Mrs **Harding** enjoyed life in the Middle East as part of the expatriate community. Indeed, it is apparent that Mr **Harding** was particularly enamoured with that way of life. It also appears that his expertise and abilities could be put to great use in that part of the world.
 11. The political and geopolitical situation in the Middle East worsened after the events which occurred in the United States of America on 11 September 2001. A number of armed attacks occurred in Saudi Arabia against Westerners. One of Mr and Mrs **Hardings**’ close friends was killed in the course of such an attack. Other attacks occurred in and around the area where the **Hardings** were living. For these reasons Mrs **Harding** returned to England with her two sons where those boys continued their schooling. Although they returned to the Middle East in August 2003, in the following year Mr and Mrs **Harding** decided to relocate to Australia. In her affidavit, Mrs **Harding** deposed that the move to Australia was always intended to be temporary and only until the security situation in the Middle East improved. At this time she was pregnant with her third child. In Australia Mr and Mrs **Harding** built a house at Warana on the Sunshine Coast in Queensland which was completed in early 2004. Although it was not stated explicitly, it appears that the location was chosen due to its proximity to Mr **Harding**’s parents and siblings. In any event, Mrs **Harding** and her two boys moved into the property in June 2004. Mr **Harding** remained in Riyadh until May 2006 at which time he decided to leave the Middle East and re-join his family in Australia.

12. In Australia, Mr **Harding** moved into the family home at Warana. He commenced working for a company called CADET Training and Employment as an operations manager. Although he enjoyed this role and being back in Australia, he was receiving significantly less income than was available to him in the Middle East. The reduced remuneration had the consequence that the lifestyle which he had previously enjoyed was affected and somewhat diminished. That said, he remained in Australia for approximately three years.
13. In February 2009, he received an offer of employment to join the firm TQ Education and Training Limited (TQ Education) which was a UK based company. The offer was to work in Saudi Arabia as the Director of Training. The salary attached to the position, being USD\$175,000, was substantially in excess of what he was then receiving being AUD\$115,000 and, in Saudi Arabia, his income would not be taxed.
14. After ascertaining that it would be permissible for him to live in Bahrain and travel each day to Dammam in Saudi Arabia for work, Mr and Mrs **Harding** agreed that Mr **Harding** would accept the position with TQ Education and relocate permanently to the Middle East. At that time the **Hardings'** middle child, Scott, had two years remaining in order to complete his High School education and they agreed that Mrs **Harding** would move to the Middle East towards the end of 2011, after Scott's secondary education was finalised.
15. Mr **Harding** deposed that when he left Australia in March 2009 he did so with an intention to live and work in the Middle East permanently or, at least, indefinitely. He said he had no fixed intention of when or if he would return to Australia. He also claimed that he expected that Mrs **Harding** and their youngest son would join him in Bahrain towards the end of 2011 and that they would live with him. He further said that when he left in March 2009 he did not expect to ever live in the property at Warana again. For that reason he took his clothes, suits and other personal belongings with him to Bahrain. He sold all of his significant personal possessions in Australia including his boat and his car. Although some of his possessions remained, they were not of a type which Mr **Harding** ever intended to use again and he left them for the use of his sons who still resided at the Warana property. These included fishing gear and a small tin runabout, as well as water skis. Whilst it may have been the case that several other items were left at the Warana property, I accept the general thrust of Mr **Harding's** evidence that, when he left Australia in 2009, he took with him all of his own personal belongings.
16. Of course, he retained joint ownership of the family home in Warana with his wife. However, he intended that to be for the use and enjoyment by his wife and his children whilst they remained living here. I also accept his assertion that, when he left in 2009, he did not ever intend to reside in that property as his family home again.
17. It is true that Mr **Harding** returned to Australia each year. Generally he did so when it was convenient to his working conditions. When he returned he stayed in the Warana property with his family. He claimed that he did so because that was where his wife and family resided but that he was then effectively only visiting them. Moreover, he did not intend to take up full time work on the Sunshine Coast ever again.
18. From about March 2009 until about February 2015, Mr **Harding** lived in Bahrain and worked in Saudi Arabia. He had entered into an employment contract with TQ Education. Whilst on its face the contract was for a duration of 12 months, it is apparent the agreement was varied and necessarily extended over time. For the full extent of the period during which he was in Bahrain and working in Saudi Arabia, he only ever signed the one employment agreement.
19. The nature of Mr **Harding's** work in Saudi Arabia was to run TQ Education's training facilities. That company had a contract with Saudi Petroleum Service Polytechnic pursuant to which it would operate training schools for persons wishing to work in the petroleum industry. During the six years whilst Mr **Harding** undertook this work, TQ Education expanded the number of facilities it operated and his responsibilities increased. That caused him to travel more within Saudi Arabia.
20. In terms of his living arrangements Mr **Harding** chose to live in Bahrain and cross the causeway each day to work in Saudi Arabia. He claimed that the living conditions in Bahrain were substantially more comfortable than in Saudi Arabia. In Bahrain the restrictions on expatriates were less harsh, the society was more liberal and there were greater opportunities for families. The attractiveness of Bahrain as a place to live for people working in Saudi Arabia is well known.
21. In the five or six years during which Mr **Harding** lived in Bahrain, he resided in an apartment building called "Classic Towers". Whilst he moved from unit to unit as his circumstances required, it appears that he remained located in the same unit block. Initially he took a two bedroom apartment because he believed that his wife and children would visit him from time to time. He remained in that apartment from 10 June 2009 until 9 June 2011. It would appear that when his marriage broke down in around 2011 and he realised that his wife would not be moving to Bahrain, he moved in to a one bedroom apartment where he remained until 9 June 2012. However, by 10 June 2012 he had formed a relationship with a Ms Gonzalez who wished to live with him and that had the consequence that he moved back into a two bedroom apartment with a full sized kitchen.
22. The nature of these apartments and the type of accommodation they provide becomes more relevant when considering the question of whether Mr **Harding** had established a permanent place of abode in Bahrain. This is discussed below. Presently, it is only necessary to observe that the apartments were effectively fully furnished apartments and the additions which Mr **Harding** made to the contents of the apartment were more for comfort rather than out of necessity and were not enduring. That, perhaps, excludes sheets, towels, linen and the like.
23. Each of the apartments was leased from the same Bahraini national who owned all three apartments in which Mr **Harding** lived from 2009 to 2015. Pursuant to the lease agreements Mr **Harding** was responsible for utility charges to the extent to which they exceeded 35 Bahraini dinars per month. He was responsible for telephone charges. The units were not serviced *per se*, however, Mr **Harding** utilised the facilities offered by the apartment building complex to secure the services of a cleaning lady once a week.
24. Mr **Harding** claims that these units became his home and, when he went on holidays, he would leave his personal belongings there. He had exclusive possession of the apartments pursuant to the leases.
25. In the period immediately following Mr **Harding's** return to the Middle East, he started making plans to relocate his wife and youngest son to Bahrain. In July 2009 the family visited him for a few weeks. During that time he and Mrs **Harding** commenced looking for appropriate accommodation for the family and considering the options in relation to schools for their youngest son. In fact, that son, Jordan, was enrolled in the British School in Bahrain for the academic year commencing in 2011.

26. Ultimately, however, Mr and Mrs **Harding**'s marriage did not survive the arrangements which they had put in place. They separated in about October 2011 and divorced in March 2014.
 27. Subsequent to the separation Mr **Harding** commenced the relationship with Ms Gonzalez. That relationship continued until approximately 2014 at which time Mr **Harding** committed to moving to Oman for work in the following year. Ms Gonzalez was reluctant to move to Oman and that had the consequence that the relationship came to an end.
 28. Subsequently, Mr **Harding** formed a further relationship with his now present wife, Monique. It appears that Monique **Harding** moved in with him in Oman in 2015 following their marriage on 10 January of that year. The move to Oman was prompted by Mr **Harding** ceasing his employment with TQ Education and taking up employment with Takatuf Petrofac Oman.
12. The learned primary judge made other findings of fact which Mr **Harding** relied upon. These were as follows:
- (a) At [53], his Honour said:

In these unusual circumstances, I accept that in 2009 Mr **Harding** left Australia intending to leave it permanently as a place where he might reside.

- (b) At [54], his Honour said:

The objective circumstances of Mr **Harding**'s departure support his assertion that he was leaving Australia to permanently reside in the Middle East ...

- (c) At [55], his Honour said:

These above factors are indicative of Mr **Harding**'s intention to leave Australia for good, at least in the sense of not having any intention of returning here to live. ... Indeed, he has not returned to Australia to live since he departed in 2009. He has continued to reside in the Middle East.

- (d) At [75], his Honour said:

Here, Mr **Harding** was content to live in a fully furnished apartment in circumstances where it and the furnishings and fittings were owned by a third party. ... It is apparent that Mr **Harding** took leases of the apartments as extended term propositions. They were not for brief, short term accommodation and that is true even though Mr **Harding** did not intend to stay in the apartments permanently.

- (e) At [79], his Honour said:

It is also apparent that Mr **Harding** made his life in Bahrain. It was the place from which he commuted daily to his work in Saudi Arabia. He formed friendships there and it was where he attended restaurants and bars after work. He also went to the beaches there and engaged in go-karting at the local grand prix track. In general terms, he pursued the expatriate lifestyle with which he had been familiar for many years.

- (f) At [86], his Honour said:

When he left Australia in 2009 he did not intend to return to live here. His entire expectations were that he would live in the Middle East and within a few years his wife and youngest child would follow. ... On his departure from Australia, Mr **Harding**'s intention was to permanently leave Australia and his residence here. He intended to resume his residency in the Middle East in one country or another and to pursue his career there regardless of what his family did.

13. In addition, Mr **Harding** relied upon the following findings at [81] and [150] as follows:

81. In this case, in 2009 when Mr **Harding** left Australia for the Middle East he had a strong and fixed intention to leave Australia and make a new home overseas. Australia, and in particular the Warana property, remained as a convenient place where his wife and children remained, on a temporary basis, pending their move to Bahrain to be with him. For Mr **Harding** his return to Australia was in the nature of a holiday, albeit extended, because he was attempting to encourage his wife to relocate to the Middle East and thereby save their marriage. Given his determination to leave and live permanently overseas with no existing intention to return to live here, his visits were solely for the purposes of seeing his family and encouraging his wife to change her mind about her decision not to follow through with their original plan. It is not possible to conclude that, by his visits, he was returning to a place which he regarded as, or was, his home.

...

150. Neither Mr nor Mrs **Harding** envisaged the apartment [in Bahrain] would be the family home when she relocated. In that respect it can be concluded that Mr **Harding**'s residency in these apartments was always, and at least during the relevant income year, intended to be for a temporary purpose. His plan was to live in this type of accommodation until he acquired a house for his family and him to live in when they joined him in Bahrain after his second oldest son completed his schooling in Australia in 2011. The evidence before the Court was that Mrs **Harding** had travelled to Bahrain for the purposes of looking for a family home to acquire and in which they would live when she moved to Bahrain with their youngest son. In his affidavit, Mr **Harding** [said] that this was part of their overall plan (at paragraph 53 of his first affidavit). He also indicated that he would have acquired a larger apartment or a house for when his wife and youngest relocated there (at paragraphs 82 to 90 of his first

- affidavit). In any event, it is clear enough that Mr **Harding**'s presence in the apartments in the Classic Towers complex was only for a temporary period of time, being until he acquired a house, or a larger apartment, for his family and himself. In terms of the authorities on this section which have been referred to above, this would tend to suggest that Mr **Harding**'s presence in the apartments in the relevant income year was "temporary" or "transitory".
14. The Commissioner relied upon certain other facts as establishing objective connections with Australia sufficient to ground a finding of residency here in 2011. We shall address those findings when dealing with the Notice of Contention. The Commissioner otherwise supported the findings made by the learned primary judge especially those concerning the temporary quality of Mr **Harding**'s accommodation in Bahrain.
 15. Whilst the parties, and the learned primary judge, were focused on Mr **Harding**'s position when he first arrived in Bahrain in March 2009, the following further findings were made which were relevant to the income year ended 30 June 2011. Subject to these matters, the parties were content for the Court to assume that findings made in relation to the 2009 year were also applicable to the 2011 year. The specific findings included the following:
 - (a) Mr and Mrs **Harding** made enquiries about a suitable school for their youngest son and, in fact, had enrolled him in the British School for the education year commencing 2011 ([54(i)]).
 - (b) Mr **Harding** purchased a second car for his wife to use when she joined him in Bahrain ([54(j)]).
 - (c) By Mr **Harding**'s own acknowledgements, his presence in his accommodation in [the 2011 year] was temporary and only intended to continue until he was joined by his wife and youngest son at which time they would have acquired permanent accommodation ([151]).
 - (d) In 2011, Mrs **Harding** had indicated her reluctance to return to the Middle East. For her, that would have meant leaving the proximity of her two eldest children. Whilst Mr **Harding** made various attempts to convince her to continue with the plan they had put in place to relocate to the Middle East, he was not successful. Despite that, he was not prepared to alter his plans and the pursuit of his employment opportunities in the Middle East by returning to Australia to be with his wife and family. This, it would appear, ultimately led to his divorce from Mrs **Harding** ([51]).
 - (e) Around 9 or 10 June 2011, Mr **Harding** moved from the two bedroom apartment into a one bedroom apartment in the same apartment complex ([74]). He remained in that single bedroom apartment for 12 months and then moved again to yet another apartment. On each occasion on which he moved he was able to pack all of his belongings into a few suitcases and an overnight bag and use the elevator in the building to transport his assets to a new apartment. It can be expected that he was also required to move the televisions which he had acquired to the new premises ([140]).
 - (f) The finding at [79], set out above.
 - (g) That it was part of the conditions of Mr **Harding**'s contract of employment that he might be moved by his employer, TQ Education, to any of its centres, branches, facilities, associates or enterprises in Saudi Arabia. For that reason Mr **Harding** was required, in his employment contract, to acknowledge that he may be required to move to a new address in order to perform his duties ([146]).
 - (h) The finding at [150], set out above.
 16. We should finally record an important concession made by Mr **Harding**. He conceded that in the 2011 year of income he was domiciled in Australia for the purposes of subpara (i) of the definition of "resident": cf *Russell v Russell* [1935] SASRp 27; [1935] SASR 85.

Preliminary Point

17. Before the primary judge both parties had proceeded on the basis that the question for the Court in relation to the application of subpara (i) of the definition of "resident" was whether, in fact, Mr **Harding** had a permanent place of abode outside of Australia. That question was answered by the primary judge based upon the evidence before him. However, the language of subpara (i) does not support that question. Subpara (i) turns upon the Commissioner's state of satisfaction that Mr **Harding** had a permanent place of abode outside Australia, and not upon the Court's determination of that fact.
18. Where a provision reserves to the Commissioner the task of fact finding, on a Part IVC appeal in the Administrative Appeals Tribunal, which exercises administrative, not judicial, power, the Tribunal can re-examine for itself on the evidence before it whether it is satisfied that a taxpayer has a permanent place of abode outside of Australia but the role of the Court (as distinct from that of the Administrative Appeals Tribunal) is to determine whether the Commissioner had erred in law in some way. As Dixon J (as his Honour then was) said in a wellknown passage from *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353 at 360 in relation to former s 80(5) of the 1936 Act (which turned upon the Commissioner's satisfaction about the ownership of voting shares):

But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some misconception.

19. It is a question of statutory construction whether, in the case of a particular provision, Parliament intended to reserve an applicable factual determination for ascertainment by the Commissioner. Many of the cases which address this issue were usefully summarised by Lindgren J in *W R Carpenter Holdings Pty Ltd v Commissioner of Taxation* [2006] FCA 1252; 63 ATR 577. There, his Honour drew a distinction between provisions which turn on, or involve, the Commissioner's state of satisfaction about a matter, and those which merely require the Commissioner to undertake some procedural step. His Honour said at [42]:

It will prove to be important to identify precisely the conditions of tax liability specified in the [1936 Act], and to distinguish between provisions referring to the Commissioner's state of mind, eg his "opinion", or his being "satisfied" or "not satisfied", on the one hand, and provisions referring to his taking a step, such as making a

"determination" or "decision" on the other hand. I will refer to them as "state of mind" and "Commissioner's determination" classes of cases, respectively.

20. Here, in our view, the Commissioner's satisfaction about a taxpayer's place of abode is not just a procedural step but forms part of the criteria for determining residence in subpara (i), which comprises two parts. The first part requires a determination of the domicile of the taxpayer. The second part is an exception or "carve out" from domicile constituting "residency". The carve out is where the "Commissioner is satisfied" that the taxpayer has a "permanent place of abode outside Australia". Unlike the issues of where a person "resides", where a person is domiciled, and where a person has "actually been" (subpara (ii) of the definition), the exception in subpara (i) expressly and specifically depends on the state of mind of the Commissioner. It does so, not so as to create an administrative or procedural step to be fulfilled, but to reserve to the Commissioner a function which forms part of the criteria for residence. That function is his sufficient satisfaction about the permanent place of abode of the taxpayer which is the "fact" that enlivens the exception. For reasons set out below, the statutory history also supports this construction. It follows that the question for the Court below was not whether Mr **Harding** had in 2011 a permanent place of abode outside of Australia; rather it was whether the Commissioner erred in law in not being satisfied that he did have such a permanent place of abode.
21. Before us, however, the parties reached an agreement that because the case had proceeded below on a different assumed footing, it should continue on that basis. The Court was content to hear the appeal in that way. As it happens, something similar occurred in a leading decision in this area of law, namely *Federal Commissioner of Taxation v Applegate* (1979) 38 FLR 1 ("Applegate (1979)"). In that case the Commissioner had raised the applicability of *Avon Downs* judicial review for the first time in an appeal to this Court. Because the point had been raised so late, he was not permitted to rely upon it. Northrop J said at 9-10:

When the appeal came on for hearing before the Federal Court, senior counsel for the commissioner sought leave to amend the notice of appeal to include a ground that the Supreme Court of New South Wales should have dismissed the appeal from the board of review on the ground that there was evidence to support the conclusions of fact of the members of the board in their application of the relevant principles of law. This was the first time that an issue of this kind was raised, and the application was refused. The proposed new ground depended upon the exercise of the discretion conferred upon the Commissioner, or rather in this case, the board of review, see s. 193 of the Act, by the words "unless the Commissioner is satisfied" appearing in par. (a)(i) of the definition of "resident" and would have required this Court to examine the exercise of that discretion conferred on the commissioner, see *Avon Downs Pty. Ltd. v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, at p 360 per Dixon J.; *Federal Commissioner of Taxation v Brian Hatch Timber Co. (Sales) Pty. Ltd.* [1972] HCA 73; (1972) 128 CLR 28 and the other cases cited in *Melbourne Home of Ford Pty. Ltd. v Trade Practices Commission and Bannerman* [1979] FCA 15; (1979) 36 FLR 450, at pp 479-480 per Franki and Northrop JJ. Since the new ground attempted to raise an issue of a kind different from that raised in the Supreme Court of New South Wales and different from that for which leave to appeal from that court was granted, the application for leave to amend the notice of appeal in this respect was refused.

22. Whilst the Court was prepared to accede to the wishes of the parties in this case, that does not detract from our view that the criterion in subpara (i) turns upon the Commissioner's, and not the Court's, state of satisfaction. It also means that the consequences of what was said by Gibbs J (as his Honour then was) at 567-568 and by Stephen J at 576-577 in *Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* [1975] HCA 5; (1975) 132 CLR 535, concerning the function of the Court in considering whether there was legal error in the formation of the Commissioner's state of satisfaction, need not be addressed.

The Decision Below

23. As will be seen, we agree with almost all of the reasoning of the learned primary judge who, if we may say so, very helpfully set out the applicable principles of law. After much consideration, we disagree with his Honour about one point only and, as sometimes happens in revenue cases, that singular disagreement obliges us to allow Mr **Harding**'s appeal. Our point of departure with the learned primary judge may be explained by the fact that an important item of extrinsic material (discussed below) was not before his Honour.
24. The learned primary judge's reasoning concerning whether Mr **Harding** was residing in Australia in 2011 (called "ordinary residence" by the parties) may be found at [31]-[87]. We agree entirely with that reasoning and with the conclusion reached by the primary judge for reasons which will be explained below when dealing with the Notice of Contention. The position concerning where Mr **Harding** was residing was summarised by his Honour at [81] (already reproduced above), and [86]-[87] as follows:
86. Unquestionably, the circumstances of this case are most rare. It is an extraordinary situation where a husband and father would leave his erstwhile home in Australia, where his wife and family reside, to go to live and work in another country and be steadfast in that resolve regardless of whether his wife and family followed him. Although such a conclusion is somewhat counterintuitive, nevertheless, the evidence in this case points to Mr **Harding** having that exact interest. When he left Australia in 2009 he did not intend to return to live here. His entire expectations were that he would live in the Middle East and within a few years his wife and youngest child would follow. That was the basis on which he left. However, it does not follow that changing his residency was conditional upon his wife and family following. Contrary to the Commissioner's submissions the existence of such an unconditional intention was borne out by the evidence. When, in 2011, Mrs **Harding** chose to remain in Australia, Mr **Harding**'s only thought was to encourage her to relocate to Bahrain. There was no suggestion that Mr **Harding** would return to Australia. Indeed, as the events played out, Mr **Harding** put his career and lifestyle ahead of his relationships with his wife and children and pursued the work opportunities in the Middle East. This same attitude was reflected a few years later when he sacrificed his relationship with Ms Gonzalez to move to work in Oman. On his departure from Australia, Mr **Harding**'s intention was to permanently leave Australia and his residence here. He intended to resume his residency in the Middle East in one country or another and to pursue his career there regardless of what his family did.
87. It is clear that there are many factors in the circumstances of this case which are suggestive of Mr **Harding** retaining a residency in Australia. The Commissioner's conclusion that Mr **Harding** remained a resident of Australia in the relevant income year pursuant to the Ordinary Concepts test is far from being unreasonable. However, the difficulty in this

unusual case is that the many indicia of Mr **Harding**'s presence in Australia are not co-extensive with any intention to reside here. In those circumstances, he was not a resident under the Ordinary Concept.

We respectfully agree with the foregoing reasons.

25. In relation to subpara (i) of the definition, as already mentioned, it was conceded by Mr **Harding** that he was domiciled in Australia in 2011. That left the application of the exception found in subpara (i). We agree with much of the reasoning of the primary judge in relation to the determination of when a person has a permanent place of abode outside Australia. The applicable principles were summarised by the learned judge at [134] below as follows:

134. It follows that on the correct construction of paragraph (a)(i) of the definition of "resident of Australia", a person is not taken to be a "resident" for tax purposes in the following circumstances:

- (a) the person has remained domiciled in Australia, such that they have not been present in another country with an intention to remain there indefinitely or permanently;
- (b) the person is not a resident under the Ordinary Concepts test, such that they are living outside of Australia and have no residency in Australia;
- (c) the person has, during the relevant income year, a place of abode being an actual physical place of accommodation in which they live outside Australia;
- (d) the person has lived in that place of accommodation with the intention that, *whilst they are living or staying in that particular locality*, that place will be the permanent place where they live. The relevant distinction is with persons who reside in accommodation temporarily or for transitory purposes during the period in which they are in a particular place;
- (e) the person will be in the place of accommodation "permanently" whilst they are living in the locality even if their presence there is indefinite. This is consistent with the views expressed in *FCT v Applegate*;
- (f) the person might move from one permanent place of abode to another whilst they are living in a particular locality and, indeed, in the course of a relevant taxation year, but that will not prevent them having a permanent place of abode for the purposes of the Domicile test.

His Honour applied these principles to the facts, in particular [134(d)] above. His Honour's key finding was that the particular apartment Mr **Harding** was living in was temporary accommodation both by its very nature, and because Mr **Harding** intended that it be so. The accommodation was temporary because Mr **Harding**'s plan was to acquire a house once his family moved across to join him in Bahrain in 2011. That event did not occur. Rather than returning to Australia, Mr **Harding** divorced his wife. His Honour's conclusion that it followed that Mr **Harding** was a "resident of Australia" ([152]) turned upon a construction of the phrase "permanent place of abode" as a reference to a specific permanent dwelling, whether it be an apartment or house. That can be seen from the expression of principle in [134(d)]. Even though the primary judge found that Mr **Harding** intended to leave Australia permanently, the accommodation he had in Bahrain was not permanent. It followed that, on this basis, he remained a resident of this country.

26. On this issue alone we respectfully disagree with the learned primary judge. In our view, for the reasons given below, the "place" of abode, in the specific legislative context here, also refers to a town or a country. In 2011, Mr **Harding**'s permanent place of abode was Bahrain. That was the "place" where he was living. For that reason he was not a resident of Australia.

Grounds of Appeal and Notice of Contention

27. Mr **Harding**'s grounds of appeal (as amended with the consent of the Commissioner) were as follows:
1. The primary judge misconstrued the definition of "resident or resident of Australia" in [section 6\(1\)](#) of the [Income Tax Assessment Act 1936](#) (Cth) (the **Definition**) by assessing whether the Appellant's "permanent place of abode is outside Australia" within the meaning of sub-paragraph (a)(i) of the Definition by reference to the particular apartments in which the Appellant lived rather than the geographic location in which those apartments were situated (Reasons at [78], [129], [132], [134], [138]-[139], [151]).

1A. Alternatively, the primary judge misapplied the Definition in concluding that the appellant's presence in each of the apartments in which he lived during the 2011 financial year was temporary or transitory, rather than such as to give rise to a permanent place of abode outside Australia.

2. The primary judge should have found that:

- (a) the Appellant's permanent place of abode was outside of Australia during the year ended 30 June 2011 within the meaning of the Definition; and
- (b) therefore, the Appellant was not a "resident or resident of Australia" within the meaning of the Definition.

28. The Commissioner's Notice of Contention concerned the first limb of the definition of "resident" and was in the following terms:

1. The Court should also have found that the appellant was a resident of Australia according to the 'ordinary concepts' test in [section 6\(1\)](#) of the [Income Tax Assessment Act 1936](#) (Cth) during the income tax year ending on 30 June 2011. The Court erred in finding that Mr **Harding** was not a resident of Australia according to the ordinary meaning of that term during the income tax year ending on 30 June 2011.

Permanent Place of Abode

29. It is appropriate to deal with Mr **Harding**'s appeal first. The primary judge adverted to a tension which he considered seemed to exist between the concepts of "domicile" and that of a "permanent place of abode". On one view, if a person chooses to make her or his permanent place of abode outside of Australia, one might also think that that person had ceased to be

domiciled in this country. Some of the criteria for determining a person's domicile may now be found in the [Domicile Act 1982](#) (Cth) (the "[Domicile Act](#)"). [Section 10](#) of that Act 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 or her home indefinitely in that country.

30. Part of the tension observed by the primary judge may be the product of possible differences between the common law concept of a person's domicile and the consequences of the statutory changes made to that common law by the [Domicile Act](#). In *Terrassin v Terrassin* (1968) 14 FLR 151, Selby J observed that a person alleging a change of domicile had to prove by "clear and cogent evidence that the change has taken place" (at 154-155). His Honour referred to the decision of Lord Curriehill in *Donaldson v M'Clure* (1857) 20 D. 307, where his Lordship said:

... it is proper to keep in view what is meant by an *animus* or intention to abandon one domicile for another. It means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicile confer on the denizens of the country,—in their domestic relations ... in their purchases and sales and other business transactions ... in their political or municipal status,—and in their daily affairs of common life; but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicile is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence.

31. That was a statement of the law relating to the test for determining a person's domicile of choice when the present definition of resident was inserted into the *Income Tax Assessment Act 1922* (Cth) (the "1922 Act"). Whether it remains the law having regard to the terms of [s 10](#) of the [Domicile Act](#) may be questioned, but does not arise for determination in this appeal. Certainly, it would appear to be accepted that the [Domicile Act](#) was not a codification of the common law tests concerning where a person is domiciled: *Ferrier-Watson v McElrath* [2000] FamCA 219; (2000) 155 FLR 311 at 329 per Holden and Jerrard JJ.
32. There is also a potential overlap between the ordinary concept of where one "resides" and that of a permanent place of abode. In that respect the learned primary judge referred to the judgment of Latham CJ in *Commissioner of Taxation v Miller* [1946] HCA 23; (1946) 73 CLR 93 which, in turn, cited the speech of Viscount Cave LC in *Levene v Inland Revenue Commissioners* [1928] UKHL 1; [1928] AC 217. At 222 his Lordship said:

... the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside." In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure.

Whether to "dwell permanently or for a considerable time" or "to have one's settled or usual abode" is qualitatively different from one's permanent place of abode might be doubted. As Northrop J observed in *Applegate* (1979) at 11:

The phrase [permanent place of abode] is often used as being synonymous with the word "residence" ...

33. Legislative history may be of assistance in considering the definition of resident in s 6 of the 1936 Act. Until the amendment made to the 1922 Act by the *Income Tax Assessment Act 1930* (Cth) (the "1930 Amending Act"), the federal income tax did not tax the worldwide income of a resident of Australia. Indeed, the 1922 Act contained no definition of a "resident", although it did contain the concept of an "absentee" person. Because the 1930 Amending Act provided for the taxation of Australians in respect of income derived from all sources, whether in Australia or elsewhere (achieved by the insertion of a new definition of "assessable income"), a definition of "resident" was required. The resulting definition introduced by the 1930 Amending Act has relevantly remained unaltered ever since.
34. "Explanatory Notes" to the 1930 Amending Act (the "Notes"), issued under the authority of the then Commonwealth Treasurer, suggest that a purpose of subpara (i) of the definition of "resident" was the taxation, for the first time, of the Australian High Commissioner in London, together with the Agents-General of the states, and their respective staff. Until the 1930 Amending Act, these individuals were not liable to pay income tax under the 1922 Act, nor British income tax. The Notes, which were not before the learned primary judge, state the following about the primary test of where a person resides:

The primary test is actual residence in Australia. If a person is in fact residing in Australia then, irrespective of his nationality, citizenship or domicile, he is to be treated as a resident for the purposes of the Act. The result will be that the extension of the scope of the Act to income from sources outside Australia will apply not only where such income is derived by an Australian who ordinarily lives in Australia, but also where it is derived by a person of foreign origin who, though he may recognise Australia as his usual place of residence, has not yet abandoned his foreign nationality, citizenship or domicile.

35. The Notes record an explanation for the "second test" in subpara (i), which turns upon the "domicile" of the taxpayer, a term said to be of "strictly legal significance". The Notes state that a person in certain circumstances can be domiciled in a particular country although he or she is not actually residing there and in some cases "although he has abandoned his residence in that country and has no intention of residing there". The Notes then state:

The application of the test of domicile will cause the High Commissioners for Australia and Agents-General for the Australian States, together with the members of their staffs, to be treated as residents of Australia liable to income tax assessment on Australian and extra-Australian income as proposed for other residents.

There is also an explanation for the exception to the second test. The Notes record:

In order that the test may not be applied to persons who have definitely abandoned their Australian residence, a condition is provided that a person whose legal domicile is in Australia is not to be treated as a resident if the Commissioner is satisfied that his permanent place of abode is outside Australia.

36. The third test of residence (in subpara (ii) of the definition) is described in the Notes in the following way:

The third test to be applied is, subject to certain conditions, actual presence in Australia for more than half the financial year in which the income the subject of assessment is derived.

This test is necessary in order to obviate the great difficulties which occasionally arise in establishing to the satisfaction of a Court that a person is resident in any particular country.

In order that there may be no danger of treating as residents persons who are purely visitors, the condition is imposed that this test is not to be applied to treat any person as a resident if the Commissioner is satisfied that that person has his usual place of abode outside Australia and does not intend to take up residence in Australia.

The foregoing suggests that the primary or first test of residence is largely directed at the identification of where physically a person ordinarily lives regardless of citizenship or domicile. The second test (aside from the exception to it), is not directed at a person's physical presence in Australia, but with the identification of her or his domicile in this country, regardless of where she or he lives. It thus extends to the High Commissioner living in London. The exception in subpara (i) then assumes that the person is not physically present in Australia during the year of income, but is nonetheless still domiciled here. Where it can be shown to the Commissioner's satisfaction that that person has "definitely abandoned" their Australian residence, Parliament's intention is that that person should not be subject to federal income tax. A person who ceases permanently to live in Australia, but who nonetheless considers themselves still to be an Australian might fall within this category. Such a person may not have an "intention to make his or her home indefinitely" in another country for the purposes of [s 10](#) of the [Domicile Act](#). That may be because, for example, there is no new country to whom that person now wishes to pledge allegiance; or it may be because, whilst physically living in a foreign country with no plan to return to Australia, there has not been a conscious relinquishment of Australian identity. As Lord Macnaghten observed once in *Winans v Attorney-General* [\[1904\] AC 287](#) at 291:

Lord Chelmsford's opinion [in *Udny v Udny* (1869) LR 1 HL, Sc 455] was that "in a competition between a domicile of origin and an alleged subsequently acquired domicile there may be circumstances to shew that however long a residence may have continued, no intention of acquiring a domicile may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of intention to retain the domicile of origin, but whether it is proved that there was an intention to acquire another domicile."

37. In *Terrassin*, Selby J said of this passage at 165:

Such an intention [to acquire another domicile], I think, is not to be inferred from an attitude of indifference or disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be ... a "fixed and settle purpose".

38. Earlier, at 163, Selby J approved of the following passage from Cheshire's "Private International Law" (7th ed, Butterworths, 1965) in relation to determining whether there had been an acquisition of a domicile of choice:

Nothing must be neglected that can possibly indicate the bent of the resident's mind. His aspirations, whims, amours, prejudices, health, religion, financial expectations – all are taken into account. As Lord Atkinson observed with respect to *Winans v Attorney-General*, "the tastes, habits, conduct, actions, ambitions, health, hopes and projects ... [are] all considered as keys to his intention to make a home in England": *Casdagli v Casdagli* [\[1919\] AC 145](#) at 178.

It follows that there is no incongruity in a person physically living permanently in another country whilst retaining at all times an Australian domicile. For that purpose and critically, what has to be abandoned for the purpose of subpara (i) of the definition, is not "Australia" but "residence" in Australia. The concept of physical abandonment and then living in another country sufficiently directs attention to the functional purpose of the exception. In that respect, the description in the Notes of the exception is also consistent with our earlier conclusion about the role of the Commissioner's state of satisfaction.

39. In contrast to the second test, what is described in the Notes as the third test in subpara (ii) is, initially, concerned with a person who is physically present in Australia for most of a given year of income. The exception to it probably applies to a person who is physically present in Australia for the required number of days but who would not be considered to be an Australian because he or she is only a temporary visitor of this country for a period of time. That period might even extend to a term of years.

40. In the context of the legislative history, in our view, the phrase "place of abode" is not a reference, as one might have thought, only to a person's specific house or flat or other dwelling. If that had been Parliament's intention it would have used the phrase "permanent abode" rather than "permanent place of abode". The word "place" in the context of the phrase "outside Australia" in subpara (i) invites a consideration of the town or country in which a person is physically residing "permanently". So long as the taxpayer has "definitely abandoned" his or her residence in Australia, it does not serve the function or purpose of the exception to subpara (i) to require that the taxpayer be permanently located at a particular house or flat in a particular town within a foreign country. Nor, indeed, does it serve the functional purpose of the exception to require the person to live in one particular town, suburb or village within a given country. In our view, drawing a distinction between someone who buys a singular flat in a foreign country as against someone who lives in a series of temporary flats in that same country does not promote the rationale of the exception in subpara (i). That rationale is that a person domiciled in Australia is not to be made subject to federal income tax when they have abandoned in a permanent way their Australian residence. For the promotion of that rationale, it is unnecessary for the taxpayer to live outside of Australia in any particular way. It follows that the word "place" should accordingly be read as including a reference to a country or state. Having said that, we do not favour the proposition that it does not matter if the taxpayer is not permanently in one country, but moves between foreign countries. In our view, the words "permanent place" require the identification of a country in which the taxpayer is living permanently. We shall return to the concept of permanence.

41. The decision of Sheppard J at first instance in *Applegate v Commissioner of Taxation* [1978] 1 NSWLR 126 (“*Applegate* [1978]”) supports the foregoing conclusion. In that case a Sydney solicitor was given the task of opening a branch office for his firm in Vila in the New Hebrides. He and his wife gave up the tenancy of their flat in Sydney and moved to Vila in November 1971. When they arrived they lived in a hotel for two weeks and then obtained the lease of a house for a term of one year with a right of renewal for a further like period. That may be contrasted with the long-term lease entered into here in 2009 (for two years). They left no assets in Australia. The solicitor’s intention, and that of his firm, was that after an indefinite period of time he would return to the Sydney office. In July 1973, he became ill and on medical advice he returned to Sydney. The issue for determination was whether he had a permanent place of abode outside Australia notwithstanding his intention to return to Australia at some point in time. Sheppard J, then a judge of the Supreme Court of New South Wales, found for the taxpayer and overturned the decision of the Board of Review. As part of his Honour’s reasons, Sheppard J said that the place of abode could refer to the house a person lived in or the country, city or town in which a taxpayer might be found. His Honour said at 134:

The question is whether the taxpayer in a given case has satisfied the Commissioner that he has a permanent place of abode outside Australia. Upon the basis of the Chairman’s analysis (that is in *Case No. 56*) – and with that analysis I do agree – “place of abode” may mean the house in which a person lives or the country, city or town in which he is for the time being to be found. I am of the view that the latter is the meaning of the expression used in s. 6(1.) of the Act. Thus a person might be correctly said to have a permanent place of abode in, say, Vila, notwithstanding that during a given period he lived in a number of different establishments occupying each for only a relatively short period. His case is no different from one where a person, such as the appellant here, lives, for a substantial period, in the same house. Leaving aside for the moment the effect to be given to the word “permanent”, it is correct, in the present case, to say that the appellant’s place of abode as from 8th November, 1971, until the end of the income year in question and beyond, was Vila, not overlooking the fact that the first two weeks of this period were spent, not in a house, but in temporary quarters in an hotel. During the whole of that period his place of abode was outside Australia and at Vila in the New Hebrides.

(Emphasis added and footnote omitted.)

The foregoing passage strongly supports the construction of the phrase “permanent place of abode” that we favour. The Commissioner submitted that in this passage Sheppard J did not intend to express any proposition of law, and that instead, he was merely making findings of fact. With respect, we disagree.

42. The case went on appeal to the Full Federal Court: *Applegate* (1979), *supra*. The appeal was dismissed. Both senior counsel for the Commissioner and for Mr  **Harding**  respectively submitted that the Court on appeal did not need to consider the meaning of the word “place” in the phrase “place of abode”. Rather, the focus was on whether the taxpayer’s intention to return to Australia at some point meant that he had remained a resident of Australia. We agree with that submission. The Commissioner, however, submitted that it would appear that at least Fisher J was of the view that a “place of abode” was a reference to a house or dwelling. In that respect, the following passages at 16-17 of *Applegate* (1979) were relied upon:

To my mind it is significant that the word “permanent” is used to qualify the expression “place of abode” i.e. the physical surroundings in which a person lives, and to describe that place.

...

It follows that it is, in my view, proper to pay greater regard to the nature and quality of the use which a taxpayer makes of a particular place of abode for the purpose of determining whether it qualifies as his permanent place of abode.

...

To my mind the proper construction to place upon the phrase “permanent place of abode” is that it is the taxpayer’s fixed and habitual place of abode. It is his home, but not his permanent home.

43. The Commissioner submitted that when Fisher J described a permanent place of abode as a person’s home, and referred to the nature and quality of the “use” which a taxpayer makes of a particular place of abode, his Honour must have been referring to a specific dwelling. We think that is a fair description of what his Honour meant. But Fisher J’s observations have less force because they were not made in the context of the issue before the Court in this appeal. Moreover, they do not appear to have been adopted by either Franki J or Northrop J. Indeed, Franki J observed at 3 as follows:

In the argument before us nothing turned on the meaning of the words “place of abode” and both parties adopted the view that these words were to be given a broad meaning.

His Honour largely otherwise agreed with Sheppard J’s judgment.

44. Both sides relied on the following passage in the judgment of Northrop J where his Honour explained why the exception in subpara (i) of the definition of resident did not require an intention to live outside of Australia “indefinitely”. His Honour said at 11:

In my opinion that contention should be rejected. The qualification applies to persons who, although domiciled in Australia, do not reside in Australia within the accepted meaning of the word “reside”. The qualification is stated in an affirmative form, namely, where the person has his permanent place of abode outside Australia. The qualification is not concerned with whether a person has abandoned his Australian domicile or has acquired a new domicile or not. The qualification is concerned with the [person’s] permanent place of abode. The phrase “place of abode” may have many meanings, it can refer to the building or place where a person sleeps and it can refer to the building or place where he is usually found, for instance, “his place of business”, see *Price v. West London Investment Building Society* [(1964) 1 WLR 616, at 621] per Danckwerts L.J. The phrase is often used as being synonymous with the word “residence” see, for example, *Levene v. Commissioners of Inland Revenue* [[1928] AC 217] and *Commissioners of Inland Revenue v. Lysaght* [[1928] AC 234]. In the present case there can be no doubt that whatever meaning is given to the phrase, during the period in question the taxpayer’s “place of abode” was outside Australia. During that period he did not reside in Australia. He had no residence in Australia. He had no home in Australia. He did not carry on business or work in Australia. He received no income

from sources within Australia. It follows, therefore, that the real issue is whether, during the period in question, the taxpayer's place of abode outside Australia was permanent or not.

We do not think that the foregoing passage either supports or detracts from the case presented by either side.

45. In his judgment Northrop J also explained the meaning of the word "permanent" in the phrase "permanent place of abode" at 12 as follows:

The word "permanent" as used in par. (a)(i) of the extended definition of "resident", must be construed as having a shade of meaning applicable to the particular year of income under consideration. In this context it is unreal to consider whether a taxpayer has formed the intention to live or reside or to have a place of abode outside of Australia indefinitely, without any definite intention of ever returning to Australia in the foreseeable future. The Act is not concerned with domicile except to the extent necessary to show whether a taxpayer has an Australian domicile. *What is of importance is whether the taxpayer has abandoned any residence or place of abode he may have had in Australia.* Each year of income must be looked at separately. If in that year a taxpayer does not reside in Australia in the sense in which that word has been interpreted, but has formed the intention to, and in fact has, resided outside Australia, then truly it can be said that his permanent place of abode is outside Australia during that year of income. This is to be contrasted with a temporary or transitory place of abode outside Australia.

(Emphasis added.)

We respectfully agree with these observations of Northrop J.

46. *Applegate* (1979) was subsequently applied by Sheahan J in *Federal Commissioner of Taxation v Jenkins* (1982) 59 FLR 467. The Commissioner accepted that this decision did not support the narrower interpretation of the word "place" that he favoured, although, again, that case was not concerned with the issue raised by this appeal.
47. Below, the primary judge did not accept that the word "place" in the definition of "resident" could mean a country. His Honour said at [114]-[115]:

Generally, a "place of abode" refers to a fixed site such that a person who lives in a car which goes from place to place does not have a place of abode: *R v Bundy* [1977] 1 WLR 914. A person of no fixed place of abode is a person who is itinerant and that is so even if they live in the same city. Although there are many cases that consider the expression "place of abode", those considerations are coloured by the context of particular legislation in which the expression is used. On a broad analysis of the cases, it would appear that where legislation using the expression "place of abode" affects a person's substantive rights, the expression is construed to confining the word to the ordinary meaning, namely the place where a person lives and sleeps, as was the case in *R v Hammond* [1852] EngR 108; (1852) 117 ER 1477. However, where the expression is used in a more procedural sense; namely, where notice is required to be given to a person; a wider meaning is usually adopted; *Price v West London Investment Building Society* [1964] 1 WLR 616, 621-2; *Stylo Shoes Ltd v Prices Tailors Limited* [1960] Ch 396; such that the place of a person's business might be regarded as their place of abode. Generally, in the case of a body corporate, its place of business would be its place of abode. There is little or no authority to the effect that a person can have a "place of abode" in a particular country rather than at a particular residential location there. Whilst it was suggested in *Applegate* that this was the case, there is much authority to the contrary: *R v Webb* [1896] 1 QB 487.

48. We generally agree with [114]. We agree that the usual meaning of the phrase "place of abode" is a reference to the dwelling where a person lives. We also accept that the meaning of the expression "place of abode" may be "coloured" by legislative context. However, we respectfully do not agree with [115] if his Honour was intending to suggest that what Sheppard J relevantly said in *Applegate* [1978] about the word "place" is not good law. In our view, Sheppard J was correct. That is in part because of what was said in the Notes, which the learned primary judge did not have before him. The Notes explain well the rationale to the exception in the "second test", which we have already mentioned. It is also because, understanding that rationale, we cannot accept that Parliament intended that the legal criterion for determining whether a person living overseas, falls either within or outside the federal income tax system, should turn upon whether they do or do not live in a fixed or permanent dwelling. That distinction is unnecessary.
49. The authority cited by the learned primary judge for the proposition that the phrase "place of abode" cannot refer to a country where a person lives – *R v Webb* [1896] 1 QB 487 – we respectfully do not find to be of assistance. That case was concerned with the effective service of a summons for the purposes of the *Bastardy Laws Amendment Act 1872* (UK). The phrase in question was "the summons was duly served on such person, or left at his last place of abode". The conjunction of the phrase "of a person" with the phrase "last place of abode" would support a reading of that later phrase as being a reference to a person's dwelling, as would, obviously enough, the very concept of personal service. In contrast here, the conjunction of the phrase "is outside Australia" with the phrase "permanent place of abode" suggests that the Parliament's concern was whether a person had commenced to live permanently outside of Australia.
50. The Commissioner also relied on a number of other English decisions in support of the proposition that the phrase "place of abode" has a settled meaning of referring to a dwelling. With respect, the cases show that, in a given statutory context, that phrase is capable of referring to a dwelling, a proposition with which we agree. Thus:
- (a) *R v Hammond* [1852] EngR 108; (1852) 117 ER 1477 was concerned with a statutory requirement that a voting paper had to contain the names of the candidates "with their respective places of abode";
 - (b) *R v Braithwaite* [1918] 2 KB 319 was concerned with s 1 of the *Summary Jurisdiction Act 1848* (UK) which required summonses to be served personally or by leaving the summons at the person's last or most usual place of abode;
 - (c) *R v Bundy* [1977] 1 WLR 914 was concerned with s 25(1) of the *Theft Act 1968* (UK) which provides that a "person shall be guilty of an offence if, when not at his place of abode, he has with him any article for use in the course of or in connection with any burglary, theft or cheat".
51. The statutory context in each of the foregoing cases supported a construction of the phrase "place of abode" as referring to a dwelling. The statutory context here is different.

52. The decision of the House of Lords in *Inland Revenue Commissioners v Lysaght* [1928] AC 234 is perhaps of more assistance for it was concerned with the meaning of the phrase “ordinarily resident” in the *Income Tax Act 1918* (UK). In that case, the taxpayer lived in the “Irish Free State” having previously lived in England. He came to England monthly for directors’ meetings and remained on each occasion about a week for business reasons. He usually stayed at a hotel. The Special Commissioners found that he was ordinarily resident in the United Kingdom. On appeal to the House of Lords it was found that the taxpayer’s residence was a question of fact and that it was open to the Special Commissioners to arrive at the conclusion they had reached. As Viscount Sumner said in his speech at 245:

My Lords, I think it is the shortness of the aggregate time during which Mr. Lysaght is here, that constitutes the principal, though by no means the only point in his favour, but the question of a longer or a shorter time, like other questions of degree, is one particularly for the Commissioners. I do not say that time might not be so short, or again so long, as to make it right to hold, no matter what other evidence there was, that, as the case might be, there was either no evidence of residence or that the evidence was all one way in favour of it, *but these questions are not before us.*

(Emphasis added.)

His Lordship’s decision was thus narrow in focus.

53. Earlier, in a passage cited by the Commissioner, Viscount Sumner had said “[o]ne thinks of a man’s settled and usual place of abode as his residence”. His Lordship was not, however, concerned with the meaning of the phrase “place of abode”. He was concerned with the phrase “ordinarily resident in the United Kingdom” and for that purpose, in the passages cited, the phrase “place of abode” was being used colloquially in aid of a possible meaning to be given to the words “ordinarily resident”. Significantly, his Lordship went on to say that “such meanings are misleading”. That was because Viscount Sumner drew a distinction between a person’s residence, and the property where he or she may live: a person’s residence “indicates a quality of the person charged and is not descriptive of his property, real or personal” (at 244). Ultimately, Viscount Sumner decided in favour of the Revenue because there was “evidence to support, and no rule of law to prevent, a finding, that [the taxpayer] was ordinarily resident ... in the United Kingdom” (at 244). In stark contrast, (and perhaps illustrative of the difficulties to be confronted in this area) Viscount Cave LC was of the view that there was “no evidence” which supported the findings of the Special Commissioners (at 241).
54. The unchallenged finding of fact here is that in 2009 Mr  **Harding**  left Australia intending to leave it permanently. He has not since returned. In 2011 he was living in Bahrain. It is true that his family remained in Australia and he visited them over 91 days, or about 25% of the time, in that year of income. But the quality and nature of those visits supported the conclusion that the taxpayer had abandoned his residence in Australia. That was the express finding of the learned primary judge at [85]. It was based, at least in part, on the finding at [81] that Mr  **Harding** ’s visits were solely for the purposes of seeing his family and encouraging his wife to change her mind about her decision not to follow through with the original plan whereby his family would join him in Bahrain. We shall return to that finding for the purposes of considering the Commissioner’s Notice of Contention. Having abandoned his residence in Australia, it should be concluded that Mr  **Harding** ’s permanent place of abode was, from 2009, in Bahrain.
55. Whilst there are fewer findings about Mr  **Harding** ’s intentions during the 2011 year of income (as distinct from when he left Australia in 2009), the findings we have set out above concerning the year of income in dispute, if anything, strengthen Mr  **Harding** ’s claims that he had abandoned Australia as a place to live and work and that his principal place of abode was in that year in Bahrain where he lived. With profound respect for the learned primary judge the fact that:
- (a) he was living in 2011 in a serviced apartment as distinct from permanent lodging is not determinative of his liability to pay tax under the 1936 Act and the [Income Tax Assessment Act 1997](#) (Cth); and
 - (b) the accommodation was “temporary” because he intended to acquire a family home, if anything, buttressed the conclusion concerning Mr  **Harding** ’s permanent place of abode. It is relatively commonplace for Australians who seek to make their life in another country to rent accommodation on a temporary basis, sometimes for several years, whilst they seek a more permanent home.
56. For these reasons, Mr  **Harding** ’s appeal should be allowed.

The Notice of Contention

57. We now turn to consider the Commissioner’s Notice of Contention that in 2011 Mr  **Harding**  resided in Australia. It was not disputed that the test of residence was correctly set out by the learned primary judge at [31] of the reasons for decision as follows:

The ordinary meaning of the term “reside” is not, in itself, defined for the purposes of Australian Income Tax Law. That said, it is now well accepted that the ordinary meaning of the word is that identified by Latham CJ in *Commissioner of Taxation v Miller* [1946] HCA 23; (1946) 73 CLR 93 at 99-101. There, the Chief Justice considered that a person “resides” where they “lived” or where they keep house and do business and in doing so approved the observations in *Levene v Inland Revenue Commissioners* [1928] UKHL 1; [1928] AC 217. The Chief Justice said:

I should have thought that there was no doubt that a man resided where he lived, and I do not think that there is any interpretation of the word “reside” by the courts which makes it impossible to apply the ordinary meaning of the word “reside” in the present case. ...

58. The Commissioner submitted that the error made by the primary judge was to permit Mr  **Harding** ’s intention to trump the objective connections he retained with Australia. For that purpose, the Commissioner did not submit that intention was wholly irrelevant. Instead, it was said that intention should not here have been decisive of the question of residence. A taxpayer cannot avoid his Australian residence, it was contended, by an expression of intention about where he or she will live. The error, it was said, was discernible at [56] and [87] (already reproduced above) of the decision below. At [56], the primary judge said:

It follows that a consideration of the objective facts surrounding Mr **Harding**'s circumstances support his oral evidence that in 2009 he left Australia and went to the Middle East with the intention of staying there indefinitely and with no intention to return to Australia and to continue to treat it as "home". His absence from Australia and his formed intention not to return was sufficient to terminate his residency here to the extent that is determined by the "Ordinary Concepts" of residency.

59. The objective connections with Australia relied upon by the Commissioner which were said to evidence Mr **Harding**'s ongoing residence in Australia were as follows:
- (a) he was born in Australia, was an Australian national and an Australian citizen;
 - (b) he held an Australian passport and had an Australian domicile;
 - (c) he built the family home in Queensland close to his parents and siblings;
 - (d) he had lived in the family home, with his family, for approximately three years;
 - (e) he worked in the Middle East pursuant to a contract which:
 - (i) was for a limited period and could be terminated on notice;
 - (ii) required his employer's approval before it could be extended;
 - (iii) provided his employer with a contractual right to require him to leave Saudi Arabia at the end of his employment or move to a different location;
 - (f) he retained joint ownership of the family home whilst away from Australia;
 - (g) he continued to live in the family home for substantial periods of time during his regular returns to Australia while working in the Middle East, including four trips to Australia during the relevant year for 91 days;
 - (h) he supported his family financially while he was in the Middle East;
 - (i) he declared that he was an Australian resident returning home on his passenger cards;
 - (j) he lived in rented, fully furnished apartments whilst in Bahrain, which bore the hallmarks of temporary accommodation, and did not make any substantial domestic acquisitions to use in those apartments;
 - (k) he maintained the family home as his address for correspondence;
 - (l) he purchased an investment property in Australia during the relevant year;
 - (m) he maintained his own bank account in Australia and caused bank statements to be sent to the family home;
 - (n) he maintained his Medicare account, Australian private health insurance, a Queensland driver's licence and a superannuation account in Australia;
 - (o) he kept his financial affairs substantially located in Australia; and
 - (p) he made two substantial investments in Australia in 2013 with IOOF Holdings Limited ("IOOF").
60. Senior counsel for Mr **Harding** disagreed with the Commissioner's submission and contended that in a given case intention could play a decisive role. He referred the Court to the well-known decision of *Hafza v Director-General of Social Security* [1985] FCA 164; (1985) 6 FCR 444, where Wilcox J was of the view that residence involved two concepts – physical presence in a particular place and an intention to treat that place as home. His Honour said at 449-450:

Physical presence and intention will coincide for most of the time. But few people are always at home. Once a person has established a home in a particular place – even involuntarily: see *Commissioners of Inland Revenue v Lysaght* [1928] AC 234 at 248 and *Keil v Keil* [1947] VR 383 – a person does not necessarily cease to be resident there because he or she is physically absent. The test is whether the person has retained a continuity of association with the place – *Levene v Inland Revenue Commissioners* [1928] UKHL 1; [1928] AC 217 at 225 and *Judd v Judd* (1957) 75 WN (NSW) 147 at 149 – together with an intention to return to that place and an attitude that that place remains "home": see *Norman v Norman (No 3)* (1969) 16 FLR 231 at 236. It is important to observe firstly, that a person may simultaneously be a resident in more than one place – see the facts of *Lysaght* (supra) and the reference by Williams J to "a home or homes" – and, secondly, that the application of the general concept of residence to any particular case must depend upon the wording, and underlying purposes, of the particular statute in relation to which the question arises. But, where the general concept is applicable, it is obvious that, as residence of a place in which a person is not physically present depends upon an intention to return and to continue to treat that place as "home", *a change of intention may be decisive of the question whether residence in a particular place has been maintained*.

(Emphasis added.)

Hafza concerned a provision of the *Social Services Act 1947* (Cth) which had incorporated the definition of "resident" from the 1936 Act.

61. The learned primary judge specifically considered the role of physical presence and of intention in a determination of residence at [42]-[45] as follows:
- 42. The question of "presence" is relatively straight-forward and that is particularly so when there is evidence of a person's physical presence in a particular place. However, where a person has more than one residence or the question is whether they remain resident in a particular location given that they spend significant time in other locations, different issues arise. In such situations there needs to be consideration of the connecting factors or the continuity of association between the person and the particular location. Here, the question is whether the connecting factors or the continuity of association are such that they establish that the person retains a "presence" in the community as a resident. Factors such as a home, a family unit, possessions, relationships with people and institutions and the like are all relevant to the determination of whether the person has maintained a presence in the community as a resident despite being physically absent.
 - 43. The determination of whether or not a person has the intention to treat a particular place as their home will involve a consideration of numerous factors. Certainly, the evidence of the taxpayer as to their intention at the relevant time will be significant as would be any contemporaneous statement made by a taxpayer as the location of their residency. However, the objective manifestation of a person's intention is often a more accurate indicator of their state of mind at a particular time in the past than is an assertion about that alleged prior intent. A person's present belief about what their intention may have been in the past will necessarily be affected by their sub-conscious and the context in which they called upon to identify that past intention. That is especially so when, at the relevant time, the person did not then consider what their then intention may have been.

44. Even evidence of a person's contemporaneous statement as to their intention at a particular time in the past should be approached with a degree of care. Whilst that is likely to be more accurate than their present assertion of what their previous intention was, the value of the contemporaneous evidence will be affected by the circumstances of the statement and reasons for the making of the statement.
45. That being so, the more cogent evidence of a person's prior intention as to where they resided are the objective facts which reflect the person's then intention. In ascertaining whether a person intended to make a particular place their residence or to terminate their residency in a place, the facts and circumstances surrounding their mode of living will be a strong indicator of their presence in or continued association with a particular place and the intention accompanying that presence.

The foregoing passages disclose, in our view, no error of law and are plainly correct.

62. The primary judge considered the objective connections to Australia as well as Mr **Harding**'s intention. Critically, his Honour found that some of the objective connections were, if anything, supportive of a conclusion that Mr **Harding** was not a resident of Australia. We have already set out [81], which well describes the nature of the visits to Australia. That paragraph finishes with an unchallenged finding of fact as follows:

It is not possible to conclude that, by his visits, he was returning to a place which he regarded as, or was, his home.

In our view, that finding is squarely inconsistent with the proposition that, in 2011, Mr **Harding** was residing in Australia.

63. The learned primary judge addressed the other objective connections with Australia in these terms:
- (a) As to ownership of the house in Australia, it was explicable as part of the plan whereby Mr **Harding** would return to the Middle East and his wife and children would remain in Australia "pending the completion of the second eldest child's education": [59]. Thereafter, the family were to move to the Middle East with a child already enrolled at the British School in Bahrain.
- (b) As to the passenger cards completed by Mr **Harding** when returning to Australia the learned primary judge found at [64]:

In the present case, the passenger cards do constitute admissions by Mr **Harding** that, at the relevant dates, he was a resident of Australia. However, in the exceptional circumstances of this case, I accept that the effect of the admissions is overwhelmed by other evidence. In particular, I refer to what I have ascertained to be Mr **Harding**'s actual intention when leaving Australia in 2009. That, of itself, is sufficient to outweigh the effect of the admissions in the passenger card.

We respectfully agree with the foregoing conclusion.

- (c) As to Mr **Harding**'s employment with TQ Education, the primary judge accepted that there was "force" to the Commissioner's contention that his employment suggested that he was only in Bahrain on a temporary basis. However, his Honour then said at [73] as follows:

... However, the circumstances in the present matter are significantly different. Here Mr **Harding** had worked and lived in the Middle East for many years. His return to Australia was consequential upon the troubles which had occurred there. When those troubles abated his decision to return was not merely to take up the immediate offer of employment, but to reside there permanently. In his evidence Mr **Harding** asserted that even if his employment contract with TQ Education was terminated he would remain in the Middle East. Whilst it is true that his employment contract may have required him to leave Saudi Arabia on its termination, that would only have been until he acquired further sponsorship. In that respect the evidence before the Court was that Mr **Harding**'s skill and expertise made him eminently employable in the Middle East as his work history demonstrates. It is also to be remembered that he lived in Bahrain and not in Saudi Arabia. That latter location was where he worked.

We respectfully agree with these findings of fact, which were open to his Honour to reach.

- (d) The Commissioner also relied on the financial connections Mr **Harding** retained in Australia, such as the maintenance of his bank account, the purchase of an investment property, the investments with IOOF and the keeping of his financial affairs substantially in Australia. Again, the primary judge took these connections into account in reaching his conclusion concerning the residence of Mr **Harding** in the year in dispute. His Honour said at [84]-[85] as follows:

... I have accepted that, at this point in his life, his decision was to leave Australia permanently come what may and regardless of whether his family followed him at a later date. In those circumstances, the financial arrangements which remained in place, or which were put in place subsequent to his departure, are more properly regarded as the remnants of his prior residency and the fact that he retained ongoing responsibilities to Mrs Tracy **Harding** and her children for whom Mr **Harding** provided. They should not be seen as indicators of a continuing intention to maintain residency in Australia.

It should be added that the factor of where a person maintains investments may, in these days, have little bearing on where a person resides. In the past quarter of a century there has been a growing internationalisation of investment markets which has increased the ability of people in one country to make investments in businesses in other countries. In this case it is, perhaps, not surprising that Mr **Harding** maintained significant investments in the relatively stable financial markets in Australia despite having abandoned his residency here.

Once again, there is no reason to doubt the accuracy of the foregoing findings of fact and the conclusions reached by his Honour.

64. His Honour's consideration of the objective connections with Australia, in our view, disclose no discernible error of law. The quality and nature of those connections either supported a finding that Mr  **Harding**  was not a resident of Australia, or were insufficient to overcome the significance of Mr  **Harding** 's intention to leave indefinitely. For these reasons, the Commissioner's Notice of Contention is rejected.
65. The appeal should be allowed with costs.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Davies and Steward.

Associate:

Dated: 22 February 2019

AustLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)
URL: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2019/29.html>