Assistant Secretary, Personal and Small Business
Tax Branch
Personal and Indirect Tax and Charities Division,
The Treasury
Langton Crescent
PARKES ACT 2600

By email: individualtaxresidency@treasury.gov.au

22 September 2023

Dear Sir / Madam,

Consultation on modernising individual tax residency

We write on behalf of the Australian Chamber of Commerce in Hong Kong ("**AustCham**"), in respect of the July 2023 consultation on the proposed changes to the Australian individual tax residency rules (the "**New Residency Rules**"). The consultation relates to changes that were first announced by the then Government in the FY20/21 Budget following a review of the Australian tax residency rules by the Board of Taxation in August 2019.

Our submission is focussed on ensuring that Hong Kong based Australians and Australian businesses operating in Hong Kong are on a similar footing (or at least no worse off) than Australians residing in jurisdictions that have concluded a double tax agreement with Australia.

The Consultation outlines the background to the review that was undertaken by the Board and their recommendations to modernise and simplify the current residency rules. The proposed changes are designed to ensure that the tax residency framework is consistent with the principles of adhesive residency, certainty, simplicity, and integrity.

When the proposed changes were first outlined back in 2019, we had the opportunity to engage with various arms of government, including Treasury, outlining our views as well as highlighting several areas of concern that the changes could have for many expatriates, but especially for Hong Kong residents.

At that time, we expressed our support for the stated aims of achieving simplicity in determining tax residency and greater certainty for globally mobile individuals and their employers. However,

there were several real concerns over the harsh adverse impact that the proposed changes could have on Australian businesses and individuals living in Hong Kong and elsewhere in Asia.

In particular, we highlighted how adverse the amendments will be for Hong Kong based Australians and Australian businesses operating in Hong Kong. Hong Kong plays an important role as a global financial centre as well as regional headquarters and trading hub for many Australian businesses. There are approximately over 100,000 Australian nationals living in Hong Kong, many of whom would travel frequently to Australia for work and leisure,

This number of businesses and Australian individuals demonstrates that Hong Kong tax residents will be uniquely impacted by these new residency rules more so than perhaps any other jurisdiction given that there is no double tax agreement in force between the two jurisdictions (unlike the other jurisdictions with high number of Australia businesses and individuals being Singapore, the United Kingdom, and the United States). Australian citizens and permanent residents living and working in Hong Kong (irrespective of the duration that they have lived outside Australia) are likely to be severely impacted under the proposed changes.

The new residency rules, as currently proposed, will result in an inequitable outcome for Hong Kong based employees. This will be adverse to Australian businesses as it will materially impact their ability to attract staff and executives to Hong Kong. It follows that this will have a significant adverse impact on the role and influence of Australians in the region at a critical time, when continued deep engagement on the ground is required.

The consultation outlines the proposed framework for the updated tax residency rules as well as requesting feedback on a number of specific aspects of the proposed changes. Encouragingly, many of the questions for comments relate to the issues we have raised with various members of the Government during the consultation that occurred back in 2021. However, despite the concerns that were highlighted back in 2021, the proposed tax residency framework outlined in the consultation remains unchanged from what was first proposed. This is disappointing.

Summary of substantive change requested

It is AustCham's submission that the inequitable outcomes, based merely on whether there is a double tax agreement with that jurisdiction, should be addressed through the introduction of a tie breaker test, similar to OECD Model Tax Convention on Income and Capital, where the Secondary Test applies.

The tie breaker provision ensures that individuals that are genuinely tax resident in another jurisdiction are not discriminated against and unfairly treated resulting in double tax based merely on their home jurisdiction. This discrimination and inequity will be experienced by those individuals that live and work in Hong Kong as it does not have a double tax agreement with Australia and is not expected to finalise one with Australia in the immediate future.

It is acknowledged that the introduction of such a tie breaker would, in part, be contrary to the Government's current position on the implementation of residency not being aligned with outcomes under a double tax agreement[1]. However, the tie breaker test is well understood by the ATO and tax advisers and would not, as asserted, make it more complicated for taxpayers. Indeed, it would allow for clarity on a taxpayer's residency if that individual were a genuine tax resident of Hong Kong (or another jurisdiction).

The Secondary Test, if adopted with or without amendments (which may increase the complexity) such as the exclusion of days, even an increased number of days, or different or additional factors, will distort how an individual will conduct themselves and their affairs if they move from or to Australia.

Key features of the changes

The consultation outlines the key features of the changes to the residency rules, which remain the same as the proposals announced back in 2021 as recommended by the Board. The New Residency Rules framework has the following features:

- Physical presence in Australia being the primary measure of residency, on the grounds that this would be aligned with international practice.
- The rules will focus on a connection with Australia; and
- The rules will apply additional factors to be determined objectively whether a person would be considered a tax resident or not.

Based on these features, the proposed changes will involve Primary and Secondary tests.

- The Primary Test

  The Primary test being that if a person was physically present for 183 days or more in Australia in any income year, that person would be considered to be a tax resident of Australia. In addition, if a person is physically present in Australia for less than 45 days in any income year, they will be deemed to not be tax resident.

- The Secondary Test

  The Secondary Test gives rise to the greatest number of concerns. The Secondary Test will apply where a person is in Australia for between 45 and 182 days for whatever reason. Under that test, if 2 out of the 4 secondary tests were satisfied, then such persons will be considered tax resident in Australia – subject to the application of any applicable comprehensive double tax agreement that may be in force with Australia.

[1] Paragraph 62 of the Consultation Paper

Our concerns therefore remain, for many Australians living and working in Hong Kong, the test will ultimately become a '45-day rule' as persons are likely to easily satisfy 2 out of the 4 tests. As such, Australian nationals living and working in Hong Kong will be at risk of being Australian tax resident if they spend more than 45 days in Australia. This is why we are of the view that Hong Kong will be uniquely adversely affected by the proposed changes given Hong Kong does not have a double tax agreement with Australia.

Further, given Hong Kong's role as a global financial centre, a trading hub for the region and the gateway for capital flows to and from mainland China, many businesses require their Hong Kong based employees to travel extensively, including to Australia. Hong Kong is an attractive base for Australian businesses wishing to take advantage of the gateway to China. It is unique in that Australian Business can second or relocate their Australian based individuals to Hong Kong because the infrastructure (e.g. schools, language, legal system, banking system, Australian teachers and curriculum) to support Australians living in Hong Kong is not readily replicated in China or other Asian jurisdictions.

This could therefore seriously disrupt the way in which Australians and Australian businesses in Hong Kong conduct their business dealings with China and Australia. It would particularly impact businesses in the Education, Aviation, Tourism and Financial Services Sectors, amongst many others.

Consultation questions 1 and 2. How many days in an income year should an individual with strong connections to Australia be able to spend in Australia before they are considered tax resident?

This is a particularly important issue for Australians in Hong Kong given the absence of a comprehensive double tax agreement with Australia.

We acknowledge the comment in paragraph 62 of the consultation paper that the Government is not planning to align the domestic residency rules with outcomes under the double tax agreements, despite the Board of Tax's recommendation, on the basis that it would make it more complicated for taxpayers. We do not agree that such an adoption of the tie breaker would make it more complicated for taxpayers. Indeed, we are of the view that the adoption of the double tax agreement position makes the new test equitable and simplifies the potential application of these new provisions.

We are of the view that for Australian nationals that are tax resident in Hong Kong, the rules should apply a tie breaker test for such persons. That is, Hong Kong tax residents should be able to spend up to 182 days in Australia before they are able to be considered tax resident, provided they satisfy a tie breaker test. The purpose of the tie breaker test is to align Hong Kong tax residents with Singapore tax residents, who will benefit from the double tax agreement with Australia (and residents of other jurisdictions with a double tax agreement with Australia). This

would allow Australian businesses to allow their employees to travel to and from Australia for work purposes, whilst allowing Australians to continue to visit family and friends in Australia.

The tie breaker test could be introduced as part of the legislative amendments to the residency rules and would effectively operate, if the Secondary Test applies, to test if that individual is a genuine tax resident of another jurisdiction, We believe that this would be a simpler, and equitable solution to what would otherwise be a significant problem for Australian businesses (as an Australian business or individual should not be treated differently merely because of the jurisdiction within which they reside. We would recommend that the tie breaker be consistent with the OECD Model Tax Convention on Income and Capital[2], which is widely adopted, and it would provide an objective and well understood test for those individuals with legitimate claims of tax residency elsewhere, such as in Hong Kong.

Consultation question 2. Should some days spent in Australia under circumstances be disregarded for the purposes of the 45-day count?

We firmly are of the view that the 45-day count is unworkable as it would easily result in many foreign tax residents becoming Australian tax residents merely from carrying out their regional employment duties as well as visiting family and friends. As explained above, for persons that have established a genuine tax residence outside of Australia, the threshold must therefore be increased to a more reasonable limit – say,182 days.

In the absence of a tie breaker provision, the proposed day count would somehow need to take into account the nature of the visits, and therefore some visits would need to be disregarded for the purposes of the count. However, we acknowledge that having a rule that excludes some days, will involve an element of subjectivity (requiring supporting materials), that could lead to uncertainty and perhaps even challenge. This would not be in line with the purported objectives of simplicity and certainty.

Disregarding days could be done in one of two ways, but both of these could result in unwanted complexity. For example, the framework could disregard days for employment related duties where there is no nexus with a permanent establishment in Australia. Alternatively, non-workdays could be excluded so that visits to Australia for holidays or to visit family and friends are not taken into account for the purposes of the 45-day rule test.

As you will appreciate, both alternatives may give rise to some level of judgement and therefore some uncertainty and a blurring of the lines between whether a day in Australia was for one purpose or another, together with how an individual is able to support an assertion that a day is outside the relevant count. Accordingly, consistent with the themes of simplicity, certainty, and integrity we recommend a tie break type provision be introduced into the legislation such that a

[2] See Article 4 of the OECD Model Convention with respect to Taxes on Income and Capital (2017)

person with a genuine tax residence, say in Hong Kong, would have a day limit of 182 days before becoming an Australian tax resident. As mentioned already, the inclusion of the tie breaker provision would be in line with international best practice and provide all individuals equitable treatment in determining their Australian tax residency.

Consultation questions 3, 4, 5 and 6. Could any of the four factors be defined differently? Are there any other factors better suited to identifying individuals with strong connections to Australia in an objective and simple way?

Although the intention of the changes is to simplify the criteria of when an individual will be treated as an Australian tax resident, the effect of the proposals announced is likely to result in Australians living and working in Hong Kong and elsewhere in Asia for many years being Australian tax residents going forward. The concerns stem from the construction of the Secondary Test of the New Residency Rules, which considers not just physical presence in Australia but other factors. Indeed, these other factors are such that most Australian nationals would easily satisfy at least two of the tests.

Under the proposed rules, Australian nationals and permanent residents can be treated as tax resident if they are physically in Australia for 45 days or more in a year if they also satisfy two out of the four additional substantive ties or nexus factors outlined in the framework. Broadly, the four-factor test, for Australian nationals or permanent residents, is, for pragmatic purposes, a one factor test. The other three factors follow themes in the OECD Model Tax Convention on residency for individuals but implement a threshold at a much lower level such that genuine foreign tax residents are likely to satisfy two of the four factors. The other three factors are:

- Australian family connections;
- the ownership of property in Australia and having a legal right to access such accommodation; and
- other Australian economic interests, which include participation in a business or even a bank account with 'significant' cash in the account.

Simply being an Australian national or permanent resident and either having a dependent living in Australia or a property available for use in Australia would satisfy two of the conditions. The ease with which many Australians would therefore satisfy these additional factors means that the Secondary Test is simply a '45 day in Australia' test, i.e., if a person is in Australia for 45 days or more in a year, then they will be treated as a tax resident.

Given Hong Kong's role as a global and regional financial centre and trading hub, many employees are required to travel extensively for business. For many Hong Kong residents, the introduction of the changes would mean that they will need to limit the number of visits each year to less than 45 days so as not to be considered a tax resident. This would especially be the case for someone that needs to travel to Australia frequently for business, which would "eat into" the number of days they could visit family and friends. Business could therefore be impacted by the

changes, as it could either result in less engagement in Australia, a significant adverse impact on the ability to attract Australian staff to Hong Kong or it could increase the cost of doing business as they need to compensate employees for the additional tax burden and compliance. Further, families would certainly reconsider sending their children to Australia for education if it put them at risk of being "inadvertent" Australian tax residents.

As currently drafted, no consideration is given to individual circumstances that may require unplanned and/or extended trips to Australia. Such visits could include for medical reasons, bereavements or visiting unwell members of family.

There are several solutions that should be considered.

As highlighted above, the day count could disregard certain types of visits to Australia - such as business related visits where there is no nexus with a permanent establishment being created in Australia. Alternatively, non-workdays, weekends and public holidays could be excluded so that visits to Australia for holidays or to visit family and friends are not taken into account for the purposes of the 45-day rule test.

As you will appreciate, both alternatives will give rise to some level of judgement and therefore some uncertainty and a blurring of the lines between where a day in Australia was for one purpose or another. Accordingly, we prefer a tie break type provision be introduced into the legislation such that a person with a genuine tax residence in Hong Kong would have a day limit of 182 days.

Satisfying two or even three out of the four tests should not necessarily mean that a person would automatically be treated as a tax resident of Australia. In such circumstances, a person may still not have a connection to Australia that warrants they be treated as a tax resident, especially if they have maintained a home and a genuine tax residence outside of Australia for many years. The inclusion of the tie breaker, if the Secondary Test applies, would ensure that genuine tax residents of other countries would not be unfairly caught.

There are other proposed changes that should be considered include:

- The accommodation test should only apply where a person is maintaining a property for their sole use when in Australia and not the use of a family member;
- The economic interests should only include situations where a person was actively engaged in a trade or business in Australia or where they commonly carried out their employment duties in Australia. It should not cover other investments that a person may have in Australia, including a bank account, or where those investments are managed either by third party investment managers or where they are managed from outside of Australia.
- The family connection should not cover situations where a person may have children at school in Australia, including a boarding school. It should also not cover situations where a person is present in Australia for personal reasons, such as supporting elderly parents or other family members and for medical treatment and convalescing

Consultation questions 9 and 10. Ceasing short term and long-term residency tests.

We have a real concern that the proposed changes will make it more difficult to attract senior executives to Australia if they are likely to continue to be tax resident for a period of time even after leaving Australia permanently. This will ultimately make Australia less attractive as an investment jurisdiction.

There has been a focus by Australia to entice international businesses and talent to Australia with an emphasis on leveraging the lifestyle and proximity to Asia. Following the Covid-19 pandemic and the rise in agile working, Australia should be well placed to attract entrepreneurs and experienced business leaders to relocate to Australia. Hong Kong has been specifically singled out as a source of talent and investment.

However, the proposed new rules will make it harder for senior executives to consider Australia if they are likely to remain Australian tax residents for a period of up to 2 years after they permanently depart Australia. Under the proposals, a person who relocates to Australia and establishes a tax residency for more than 6 years would continue to be tax resident for a period of two years even after they have departed Australia.

The rules clearly make it harder to cease being a tax resident of Australia upon departure from Australia and are viewed as excessively sticky and unreasonable. This would certainly come as a surprise to many senior executives given that in most countries, a person typically ceases being a tax resident at the time they leave the jurisdiction permanently. Senior executives and entrepreneurs are therefore likely to consider this to be a major disincentive to relocating to Australia and taking up permanent residence or Australian citizenship.

In our view, a long-term Australian resident should be considered to cease residency once they depart Australia permanently, with no intention of returning to Australia. This will be an issue that needs to be considered case-by-case. Persons should cease to be tax resident upon their decision to permanently depart from Australia regardless of whether they have an employment contract with an overseas employer. Australians who depart Australia permanently upon retirement or otherwise, should not be considered an Australian tax resident from the date they leave.

Consultation questions 11 and 12. Does the overseas employment rule strike the right balance between facilitating skills development through international experience and integrity of the tax residency rules?

We are firmly of the view that the proposed overseas employment rule will act as a deterrent to Australians that may seek experience overseas if they do not have an offer of employment at the time that they leave Australia.

It has become a rite of passage for many Australians to seek experience living and working overseas. This is a tradition that has benefited Australia and Australian businesses greatly over the years. Currently, an Australian that departs Australia permanently for an extended period of time should be able to establish themselves as a non-resident for tax purposes from the date that they leave. The new rules fundamentally change this position.

The proposed changes, inconsistent with the stated objective of simplicity, will greatly add to the compliance and reporting burden of Australians that leave Australia. For a period of up to 2 years, they could continue to be an Australian tax resident, subject to the application of any applicable double tax agreement. Again, therefore Australians moving to Hong Kong could be uniquely affected by the proposed new rule changes. In the absence of an offer of employment for a period of more than 2 years, such persons will continue to be tax resident in Australia.

Consultation 13. Transitional rules and how should they apply to persons that may already have departed Australia.

A basic principle of taxation should be that any changes should only be prospective and not prospective. As such, any changes that are made should only apply on a going forward basis.

At the very least the transitional rules should allow those persons that have already departed Australia sufficient time to adjust their connection with Australia having regard to the factors in the Secondary Test. This may include rationalising their investments in Australia, relocating family, and establishing alternate support structures for wider family members. All these factors are sensitive and require the person to undertake them in an orderly manner. Accordingly, the transitional provisions should:

- allow at least [2] years for a person to reorganise their affairs before the Secondary Test begin to apply; and
- disregard the activity of a taxpayer prior to the commencement of the proposed residency rules.

Conclusion

We support the stated aim of modernising the Australian tax system particularly where such reform is intended to provide certainty and simplicity for individuals regarding their tax residency status. At the same time, the reforms should seek to accommodate a reasonable level of equity and integrity.

However, the proposed new tax residency framework outlined in the Consultation is likely to adversely impact Hong Kong based residents and businesses more than any other location. This is due to Hong Kong's role as a global financial centre; a home to over 100,000 Australian nationals and importantly, the absence of a comprehensive double tax agreement.

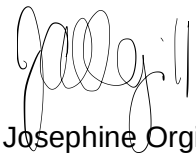
If the rules are implemented as outlined in the framework and there is no amendment to address the genuine concerns of Hong Kong tax residents doing business in the region, including Australia, the rules will have a significant impact on the cost of doing business. It is likely that Hong Kong tax residents would limit their business and personal visits to Australia and for those that must travel for business, it is likely to significantly increase the cost of doing business.

However, the integrity of the new framework can be maintained with some refinements.

For Australian nationals tax resident in Hong Kong, the rules should apply a 182-day test to determine residency. This would align Hong Kong tax residents with Singapore tax residents, which has a double tax agreement with Australia. This would therefore allow Australian businesses to allow their employees to travel to and from Australia for work purposes, whilst allowing Australians to continue to visit family and friends in Australia.

Finally, it is very important that the potential impact on businesses and tax residents of Hong Kong be addressed under the new framework. In the absence of any amendments to the rules as outlined in the consultation, the proposed changes will result in an additional cost to Australian businesses operating in Asia. Hong Kong based employees would be reluctant to travel to Australia either on business or for leisure, and it will also influence where they send their children to school and where they invest their wealth going forward.

Yours faithfully,



Josephine Orgill
Chair
The Australian Chamber of Commerce in Hong Kong

Appendix

Impact on Cost of doing Business

The proposed changes to the tax residency rules could have an additional cost to Australian businesses operating in Asia. For many such businesses, employees are required to travel extensively as part of their duties, which often includes business trips to Australia. This is especially the case for senior executives required to travel to head office in Australia, or for Asian based directors on Australian company boards.

It is quite conceivable that such employees may be reluctant to travel to Australia on business, as such days would count towards the proposed 45-day rule, which would mean less available days for personal travel to visit family and friends, or in a worse case, due to a prolonged illness or a medical emergency either to a family member or them personally in any particular year. This would have an impact on the way in which business could be conducted.

Hong Kong is an attractive base for Australian businesses wishing to take advantage of the gateway to China. It is unique in that Australian Business can second or relocate their Australian based individuals to Hong Kong because the infrastructure (e.g. schools, language, legal system, banking system, Australian teachers and curriculum) to support Australians living in Hong Kong is not readily replicated in China or other Asian jurisdictions. Notwithstanding this unique position Australian businesses could also find it more difficult to second employees from their Australian operations to postings in Hong Kong and Asia if such employees would still be considered tax resident in Australia. In the survey that we conducted of our members, the overwhelming majority indicated a reluctance to an overseas posting if they would continue to be a tax resident of Australia. From an employee perspective, the risk of being tax resident and subject to taxation in both jurisdictions (with a risk of double taxation) would outweigh the perceived benefits of an overseas posting, which would have significant implications for Australian businesses looking to expand into Asia. Of particular note is that with less Australian relocating to Hong Kong the role and influence Australian businesses and Australian individuals will have in the region will diminish.

The effect of the changes would be that Australian businesses may ultimately need to increase the compensation payable to employees to encourage them to move overseas. Employers would also need to schedule and track their employees' whereabouts to ensure they are not unintentionally caught by the rules. The foreseeable increase in costs and administrative burden would obviously conflict with the objective of the New Residency Rules – i.e. greater simplicity and lower compliance costs.

Education Sector

The education sector could be seriously impacted by the New Residency Rules. Australian teachers are highly sought after by international schools in Asia, particularly by the many

Australian international schools operating in the region, including in Hong Kong. Teachers are in a unique position in that they have extended summer holidays during which they would normally return home to spend time with family and friends. The 45-day threshold will make it much more difficult for such teachers to return to Australia for extended vacation periods as they would be at risk of becoming or remaining a tax resident of Australia. This could clearly act as a barrier to recruiting Australian teachers to move to Australian schools in Asia and seriously impact the ability of such schools to attract experienced and suitably qualified teaching staff.

The changes may also have an impact on Australian boarding schools. Australian nationals living overseas often enrol their children in boarding schools in Australia to benefit from the education system in their home country. Parents typically travel to Australia regularly and stay for an extended period during the school holidays to spend time with their children. In their current form, the ease with which Australian nationals could satisfy two of the four factors will undoubtedly discourage parents from sending their children to Australian boarding schools. We anticipate parents will instead opt for other well-regarded locations to send their children for schooling, such as the United Kingdom, given how easily they could be dragged into the Australian tax residency net.

Attracting Foreign Talent to Australia

Attracting senior executives to Australia under the New Residency Rules could be more difficult if it will be harder for them to cease to be a tax resident upon leaving Australia permanently.

We understand a Talent Attraction Taskforce has been established to entice international businesses and talent to Australia with an emphasis on leveraging the lifestyle and proximity to Asia to attract global business and foreign talent. The Government has cited the changing global environment, namely the Covid-19 pandemic and the corresponding rise in agile working, as reasons why employees, entrepreneurs and businesses may decide to relocate to Australia. Hong Kong has been specifically singled out as a source of talent and global business.[3]

Under the proposed changes, the rules could make it harder to cease being a tax resident of Australia upon departure from Australia. In particular, and what is viewed by our members as excessively sticky, a person that leaves Australia permanently after being a tax resident for several years could still find that they remain a tax resident for at least 2 years after they have left Australia. This would certainly come as a surprise to many people given that in most countries, a person typically ceases being a tax resident at the time they leave the jurisdiction permanently. Senior executives and entrepreneurs are therefore likely to consider this to be a major disincentive to relocating to Australia and taking up permanent residence or Australian citizenship.

There could also be unintended consequences for younger Australians who wish to broaden their experience and pursue overseas work experience opportunities. Such persons could also continue to be a tax resident for a couple of years after leaving Australia, which could act as a

[3]

disincentive to them when considering going overseas to explore new opportunities and experiences.

The Aviation Sector

The aviation sector is a prime example of an industry that could be significantly affected by the New Residency Rules. Hong Kong based Australian pilots and crew members who routinely travel between Hong Kong and Australia could find themselves being tax resident in both jurisdictions, even if their permanent home is in Hong Kong. In the absence of a tax treaty, an Australian pilot flying to Australia several times a month could be in Australia for more than 45 days. Landing in Australia at any time before midnight would count as one full day for the purposes of counting the number of days physically present in Australia under the New Residency Rules. The view of Australian members of the airline community in Hong Kong is that they are likely to be severely impacted by the changes given they often fly on the Australian routes. This would be a very unfortunate outcome given the aviation industry is a key enabler of many other economic activities and has already been significantly impacted by the ongoing Covid-19 pandemic.

Absence of a DTA with Hong Kong

Finally, many Australians living offshore, particularly in Hong Kong and Singapore, are concerned about how this rule will impact them. However, unlike Singapore, Hong Kong does not have a double tax agreement ("**DTA**") with Australia which would otherwise give Australians working in Hong Kong some added protection against becoming an Australian tax resident where they are also tax resident in Hong Kong. As such, Hong Kong based Australians would be uniquely impacted by the proposed residency changes given the absence of comprehensive DTA with Australia.

The benefit of having a DTA in force is that they typically contain tie-breaker provisions to determine the residency of an individual when an individual is considered a tax resident in two jurisdictions. Usually, it is the place where they have a permanent home, habitual abode, or strong economic and personal connections that determine which jurisdiction they are resident in. these tests are broadly reflected in some of the factors of the Secondary Test but the threshold to satisfy the factors in the Secondary test are significantly lower than that in a double tax agreement. For example, under the DTA signed with Australia, where a person is resident in both Singapore and Australia, the primary test of the tie breaker provides that an individual would be considered tax resident in Australia only if they have a permanent home available to them in Australia and no permanent home available to them in Singapore.[4]

[4] Article 3 of the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.

The absence of a DTA between Hong Kong and Australia is particularly concerning for the Australian business community in Hong Kong given the important role that Hong Kong plays as a global financial centre in Asia and a regional headquarters for many multi-nationals. An Australian seconded to Hong Kong could therefore be unfairly disadvantaged compared to his counterpart in Singapore.

Hong Kong's investment and trading ties with Australia

Hong Kong's relationship with Australia is somewhat unique. Hong Kong is home to over 100,000 Australian nationals and remains an important market for many Australian businesses operating throughout Asia. It is the leading financial centre in Asia and a key source of capital, being the second largest IPO market globally in 2020.[5] Hong Kong is also the regional headquarters for many multinational companies, including for many Australian businesses.

Australia and Hong Kong have had a longstanding trade and investment relationship. Hong Kong is Australia's seventh largest trading partner and fifth largest source of direct foreign investment.[6] For Australian businesses, Hong Kong's unique selling point is the key role it plays in accessing the mainland Chinese market. Hong Kong remains the gateway for capital to and from China for many Australian businesses and it is uniquely positioned to facilitate trade into mainland China due to its proximity and the stability of Hong Kong's legal and banking systems.

[5] https://www.ft.com/partnercontent/brandhongkong/hong-kong-ipo-market-resilience-and-innovation.html
[6] https://www.dfat.gov.au/geo/hong-kong/Pages/hong-kong-brief