

11 October 2019

The Manager
Remote Area Tax Concessions and Payments Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Lodged electronically at <https://www.pc.gov.au/inquiries/current/remote-tax/make-submission#lodge>

Dear Sir or Madam

Draft report on remote area tax concessions and payments

Chartered Accountants Australia and New Zealand (CAANZ) welcomes the opportunity to comment upon the Productivity Commission's draft report on remote area tax concessions and payments (the draft report). The draft report contains a number of findings, recommendations and requests for information.

CAANZ has canvassed its members, particularly those located in Queensland, the Northern Territory and Western Australia for their insights regarding these information requests. Our Northern Territory members have made a particularly significant contributions to this submission.

Executive summary

CAANZ agrees that remote area tax concessions lack focus. However, the underlying hardship of living in remote and very remote areas persists despite advances in technology and transportation. These hardships are evidenced by the high transient working populations of these areas.

In recognition of these hardships consideration should be given to better targeting remote area tax concessions by using the ABS definition of remoteness. This would provide a contemporary measure of remoteness and promote consistency. That said, the impact of such a change will be immense for residents of Darwin. CAANZ recommends that further consideration be given to the special social, financial and economic needs of Darwin with a view to including Darwin within the definition of remote. To reduce the budgetary impact of such an inclusion, consideration could be given to capping the provision of the tax concession once a certain level of income is reached.

For various legal and practical reasons, it is unclear whether tax legislation could or should target geographical areas in Australia (although offshore territories have experienced tax benefits). Clarification of the legal issues is desirable, as is research on the likely behavioural effects of treating taxpayers differently just because they live a few kilometres apart.

If the answer is that it is unwise to target geographical areas in economic need, then grants/social security benefits that are reflective of the current tax concessions should be made available. Such direct assistance has obvious advantages (such as transparency and cost control), and can be removed if the hoped-for outcomes are achieved or because of budgetary concerns.

CAANZ recommends that the Zone Tax Offset, FBT exemption for employer housing and holiday transport be retained but with more restrictive criteria based on both geographical locations and possibly income level.

CAANZ agrees with the:

- Abolition of the FBT exemption for employee provided housing;
- The proposed changes to the treatment of FBT meals for primary production employees; and
- The FBT residential fuel concession following the treatment of the CAANZ proposed changes to employer and employee provided housing.

Given that CAANZ has suggested the retention of 100% exemptions for employer housing and travel be restricted to remote or very remote areas, the issue of whether such payments should be reportable or excluded has not arisen.

Any removal of remote area tax concessions will effectively shift the cost of funding employees operating in remote or regional areas from the Commonwealth to their employers. The potential economic impact on such employers, and on the viability of the businesses or projects they conduct, needs to be researched.

It is also understood that the State and Territory governments are significant employers in these areas and so the issue of Commonwealth-State financial relations will arise. Given the budgetary constraints of the State and Territory governments it is not clear whether they will be able to continue to fully support the provision of remote area services. Outreach services to indigenous Australians should be a particular focus area.

Our Northern Territory members believe it is likely that any saving in tax expenditure due to the Productivity Commission's recommendations will be exceeded by an outlay in social service benefits. These members are also of the view that targeting remote area tax concession more tightly has the potential to help create opportunities for employment to break the welfare cycle at a much lower cost than additional welfare spending.

Constitutional issues

The elephant in the room in relation to this draft report is the ability of the Commonwealth to create tax legislation for geographical areas. The draft report¹ notes that:

- Section 51(ii) of the Constitution confers on the Commonwealth the power to make laws with respect to taxation, but so as not to discriminate between States or parts of States.
- Section 99 of the Constitution states that the Commonwealth shall not, by any law or regulation of...revenue give preference to one State or any part thereof.
- The Cox review obtained advice on this issue and did not obtain surety that the ZTO was constitutionally valid.

¹ Page 6 of the draft report

- This issue has never been judicially tested.
- The Productivity Commission has also sought advice.

The draft report, however, does not elaborate on legal advice that has been received. Nor is it clear from the context of the draft report what legal position has been adopted. The discussion of the ZTO does not discuss the possibility of the ZTO being more targeted yet has costings using different definitions of remoteness. Likewise, in the discussion of the various FBT remote area concessions there is little discussion of more targeted geographical concessions yet there is a stated interest in obtaining feedback on that possibility.

This issue has been around for a substantial period of time. CAANZ (or as it was known back then, The Institute of Chartered Accountants in Australia) in 2001 obtained advice from Patrick Brazil SC, a leading Constitutional Lawyer, in relation to the constitutional validity of the Tax Zones. His conclusion is that where measures are designed to create economic equity between regions, they must be regarded as valid. A copy of this advice is attached as Appendix A.

A clear articulation regarding the constitutional validity of taxes that have geographical boundaries would assist in the discussion and analysis of policy options that are potentially available. In the absence of such articulation, CAANZ submission proceeds on the basis that taxes can be defined by geographical boundaries where there is a need for economic equity. If that is not the case, then CAANZ proposes that any recommendations regarding the imposition of tax with geographical boundaries be substituted for a grant with similar geographical boundaries and economic needs. Such grants should be for those who are earning income and not receiving significant social benefits.

CAANZ notes the “Pandora’s Box” issues at stake here however. Today’s discussion about tax benefits based on remoteness could easily become tomorrow’s discussion around tax benefits based on areas of social and economic need due to the effect of high unemployment, de-industrialisation, natural disaster or climate change.

Increasing effectiveness, reducing complexity

CAANZ agrees that the ZTO and some of the FBT tax concessions for remote areas are overly generous given their current geographical boundaries.

In relation to the Remote Area Allowance, the Productivity Commission recommended that the ABS definition of remoteness be used as it would:

- Target remoteness more directly;
- Allow boundaries to be regularly adjusted every five years to reflect contemporary definitions of remoteness; and
- Make the process for determining boundaries more transparent.

CAANZ recommends that the Productivity Commission consider adopting the ABS definition of remoteness for the purposes of the zone tax offset and some FBT tax remote area tax concessions for

the same reasons that have been articulated above in relation to RAA. Such an approach would also provide the additional benefit of consistency, with potential reduction in complexity and compliance costs².

That said, adopting this definition will have a significant impact on Darwin residents and employers of Darwin residents. Our Northern Territory members have indicated that due to concerns about hardship and cost of living (which outlined in further detail below), they would like the Productivity Commission to reconsider the exclusion of Darwin from the regional tax concessions.

One of our Queensland members has suggested using the Modified Monash Model³ as a means of determining remoteness consistently among all forms of remote tax concessions.

Zone Tax Offset (ZTO)

Chartered Accountants generally prefers government assistance to be provided by grants rather than the tax system as it:

- Assists in ensuring that the tax system does not become overly complex, particularly for those taxpayer segments that are least able to deal with complexity.
- Allows transparency of government expenditure. As noted in the Productivity Commission's draft report, lack of reporting of tax expenditures makes it difficult to analyse their impact.
- Allows budgetary oversight.

Our Northern Territory members have expressed a contrary view, noting that when the global finance crisis occurred, the then Federal government provided a tax bonus⁴ to stimulate the economy. Providing a tax benefit (such as the ZTO) which is targeted a people who reside in a particular area, is likely to result in those people spending some of the benefit in the local area and thus helping that region to survive (although there are many non-local outlays, such as the repayment of mortgages and personal debt commitments). Our Northern Territory members also see grants as inefficient due to the costs of administrating a grants system.

The Productivity Commission has recommended that the ZTO be abolished on the basis that:

- The rationale for having a ZTO, hardship and cost of living, are no longer valid. It is stated that technology and transport have reduced hardship, and that the higher costs of living are offset by higher wages and thus there is no need for government subsidies.
- ZTO is regressive.
- ZTO is too small to make an impact.

² This approach was supported by CAANZ in our submission to the Productivity Commission's issue paper on remote area tax concessions and payments.

³ <https://www.health.gov.au/health-workforce/health-workforce-classifications/modified-monash-model>

⁴ https://www.apf.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0809/09bd093

Our Northern Territory members are of the opinion that the ZTO should be retained at a higher quantum but with better targeting through the adoption of ABS definitions of remoteness with Darwin obtaining special treatment (as noted above).

Hardship is still real

Our Northern Territory members question whether advances in technology and transport have diminished hardship to such an extent that it no longer considered worthy of being compensated. It is acknowledged advances in technology, such as air-conditioning, and advances in transportation, have alleviated some hardship. However, the physical and social isolation of remote areas is still a significant factor affecting the ability to attract people to these areas. For example:

- Telecommunications remains difficult for many areas in Australia. Our members advise that clients in remote areas still experience intermittent access to the internet (e.g. whilst the satellite is accessible or because of poor quality connections). These comments are backed by university research⁵ and the recognition by the Australian Taxation Office that many employers in remote areas are entitled to an exemption from implementing Single Touch Payroll due to poor telecommunications.
- The quality of accommodation and food is still often poor.
- Many remote areas lack opportunities to socialise. There are no parks, clubs, or cafes to meet at.
- Harsh climatic conditions,

The visible symptoms of the hardships experienced by those working in remote areas is evidenced by:

- High vacancy rates

In a 2014-15 Department of Employment Survey of Employers' Recruitment Experiences in Northern Australia⁶ it was found that employers in all locations reported difficulty recruiting for higher skilled jobs (especially for health and education), employers in the Northern Territory also found difficulty recruiting some lower skilled jobs such as truck drivers, store persons and labourers. Some employers report a total lack of applicants.

- Low staff retention

A research paper entitled "Patterns of resident health workforce turnover and retention in remote communities of the Northern Territory of Australia, 2013–2015"⁷ found that: "Mean annual turnover rates for nurses and AHPs combined were extremely high, irrespective of whether turnover was defined as no longer working in any remote clinic (66%) or no longer working at a

⁵ https://apo.org.au/node/253896?utm_source=APO+Subscribers&utm_campaign=9e5469dc15-EMAIL_CAMPAIGN_2019_08_18_11_14&utm_medium=email&utm_term=0_1452ee3b6b-9e5469dc15-84412457&mc_cid=9e5469dc15&mc_eid=a69d6ed03b

⁶ <https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&ved=2ahUKewj33la29IHIAhVFJHIKHa5eBQ4QFjAPegQIABAC&url=https%3A%2F%2Fdocs.employment.gov.au%2Fsystem%2Ffiles%2Fdoc%2Fother%2Fdemand%20for%20labour%20in%20northern%20australia.pdf&usg=AOvVaw0DPwQrp2kaVf3PwA3kGT-r>

⁷ <https://human-resources-health.biomedcentral.com/articles/10.1186/s12960-017-0229-9>

specific remote clinic (128%). Stability rates were low, and only 20% of nurses and AHPs remain working at a specific remote clinic 12 months after commencing. Half left within 4 months”.

- Transient population

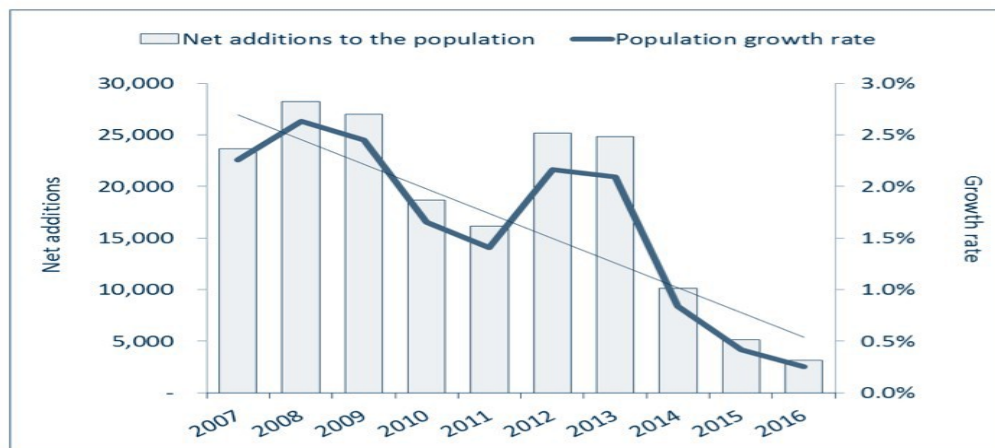
The Australian Bureau of Statistics has released figures that demonstrate that the Northern Territory has the highest rate of population turnover in Australia.⁸

- Diminishing population

A Lowy Institute report clearly illustrates the declining population group of the region⁹.

Cost of living is more than groceries

Figure 2: Population growth rates and net annual additions to the population of northern Australia



Source: Author calculations from ABS, "Regional Population Growth, Australia, 2015-16", ABS Cat No 3218.0, 30 March 2017, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/89B1791E6123CB86CA25816A001761EE?opendocument>

There is a disconnect between the cost of living information in relation to Darwin supplied by the Northern Territory government to the Productivity Commission and the findings of the Productivity Commission. Our Northern Territory members question the Productivity Commission's findings that Darwin's cost of living is less than other capital cities, particularly as the Productivity Commission has stated that it has "relied most heavily on regional price indexes compiled by the Western Australian and Queensland governments in assessing the difference in overall cost of living between remote and non-remote areas."¹⁰

⁸ <https://www.abc.net.au/news/2011-03-25/territory-has-most-transient-population/2643734>

⁹ <https://www.lowyinstitute.org/publications/heading-north-staying-north-increasing-importance-international-migrants-northern-and>

¹⁰ Page 266 of the draft report

Regressive nature of ZTO

The ZTO is regressive. If you have a high income, the ZTO is fully utilised at your top marginal tax rate. If you have a low income, then as the ZTO is not refundable, you may not be able to access the full amount of the ZTO. Even if you can access the full ZTO it would be at a lower marginal tax than a higher income taxpayer.

There are ways to eliminate or reduce the regressive nature of the ZTO. For example, the ZTO could be refundable, and/or its availability could be subject to an income cap. None of these options appear to have been considered by the Productivity Commission.

Quantum of ZTO

The quantum of the ZTO is not enough to encourage relocation. However, our Northern Territory members are of the opinion that the ZTO withdrawal would make an impact on low income earners and families. Our Northern Territory members have also expressed concern that abolishing the ZTO will place pressure on employers to increase wages to compensate for the lost ZTO. This increase will be more than the ZTO as employers will also need to account for income tax, superannuation, workers compensation and potentially payroll tax.

It is felt by our Northern Territory members that employers of the lowly paid are most likely to find it difficult to fund such an increase and their employees will be worse off. In some cases, the employers may need to let employees go. If this occurs, then any revenue gain to the Commonwealth from the abolition of the ZTO could be offset by an increase in outgoings as social security payments.

In considering the abolition of the ZTO, consideration should be given as to how it impacts incentives to work, particularly the effective marginal tax rate, given the existence of the remote area allowance (RAA). The preference of our Northern Territory members is to substantially increase the quantum of the ZTO.

FBT exemption for employer provided housing

The Productivity Commission has recommended that the FBT exemption for employer provided housing becomes a partial exemption (50%) and that the criteria for obtaining this exemption be tightened by removing the limbs that allow such a benefit to be provided on the basis that it is customary or due to the provider being a 'certain regional employer'.

These recommendations have been made on the basis that the employee obtains a private benefit from the housing and that in some areas this is being inappropriately used to significantly lower the tax liability of high income earners. Another theme underlying this recommendation is that such benefits can be 'cashed out', that is paid as wages, and if required then returned as rental income to the employer.

For very remote areas, it is questionable whether the private benefit that is provided to the employee is worth pursuing given the relatively minor size of the private benefit and the compliance costs of bringing such benefits into the FBT regime – even at 50%.

In very remote areas it is difficult to obtain any accommodation. Those required to work in very remote areas frequently camp out in their vehicles. This action is taken due to the lack of accommodation, or if accommodation is available, due to the very poor quality of the accommodation.

Increasing supply of accommodation, even when there is demand, is difficult in northern Australia due to a number of unique factors influencing land tenure, including:

- Land tenure being subject to a long-term lease arrangements¹¹.
- Large tracts of land being governed by land councils. On 11 April 2019 the Northern Territory government announced a plan to assist land councils maximise the economic and social benefits of this land¹².
- Buildings being built are already designated for government officials or traditional owners.
- The area being developed has a limited life. For example, buying a \$335,000 property in an area where the mine will expire in eleven years may result in the purchaser holding a property at mine closure with a very low market value. This makes buying a very expensive proposition.
- High costs of construction.
-

CAANZ recommends that the FBT exemption for employer provided housing apply to remote and very remote areas due to the difficulties in obtaining appropriate quality accommodation. CAANZ agrees with the removal of the limbs for customary provision and for certain regional employers.

FBT exemption for employee provided housing

CAANZ supports the recommendation to abolish the FBT concession for employee provided housing.

FBT residential fuel concession

CAANZ agrees with the recommendation that this be removed in relation to employee provided housing. CAANZ is of the view that this should be retained for employer provided housing in the circumstances outlined above in this submission.

FBT meals for primary production employees

CAANZ agrees with the recommendation that this be limited to where there is an operational reason for the employer to provide these meals and expanded by removing the need for meals to be ready for consumption.

FBT holiday transport exemption

The Productivity Commission recommends that this be abolished on the basis that “the provision of holiday transport, and any accommodation and meals consumed in the process, directly benefits employees. Such expenses are generally private in nature and would typically be met by employees from

¹¹ e.g. Gove – see <http://www.developingeastarnhem.com.au/doing-business/land-access/>

¹² <https://www.claytonutz.com/knowledge/2019/may/nt-government-sets-out-ten-actions-prioritising-aboriginal-land-and-sea-ownership-in-the-nt>

their after-tax income. Furthermore, there is no operational reason to provide these services, which employees could purchase themselves.”¹³

Whilst this may be true for postings to capital or regional centres, it is not true for remote and very remote communities. The social isolation of remote and very remote communities can affect your mental well-being. “People in rural and remote areas face a range of stressors unique to living outside of major cities. These include a greater prevalence of some chronic conditions and disability, and generally poorer health. Rates of smoking, risky drinking and illicit drug use are also higher....There is greater exposure and vulnerability to natural disasters....rates of self-harm and suicide increase with remoteness suggesting that there are very significant mental health issues to be addressed in rural and remote areas.”¹⁴

Many employers find that to ensure that they have settled and content employees, it is essential that they provide regular breaks away from their principal place of work. Providing holiday transport is an essential operational requirement for employers in remote and very remote areas in order to maintain a healthy workforce. There is no such requirement for regional centres and capital cities as there is a greater availability of distractions and opportunities for socialising.

Cost shifting needs to be recognised

States and Territories have primary responsibility for providing health, education and police services to remote and regional areas. To the extent that the States and Territories use FBT exemptions in salary packaging for their employees in those areas, there is effectively a shift of the cost of these employees from the Federal government to the States and Territories.

The PC report notes that Australia’s system of horizontal fiscal equalisation seeks to give each jurisdiction the same capacity to provide public services and accounts for the higher per capita expenditure on service delivery in remote areas. Whilst unstated, it appears that the underlying assumption is that this mechanism is sufficient, and any savings from the PC proposals can be retained by the Federal government. Our Northern Territory members have suggested that the financial capacity of State and Territory governments may be insufficient to absorb such costs. These members have also cast doubt on the appropriateness of the horizontal fiscal equalisation mechanism.

A more likely scenario from our Northern Territory members viewpoint is that employers, both private and government, will reduce the number of employees providing services in these regions. Such a reduction in services/population will further increase the isolation in these areas and lock people into the welfare cycle. It is likely that any saving in tax expenditure will be exceeded by an outlay in social service benefits. Targeting remote area tax concession more tightly has the potential to help create opportunities for employment to break the welfare-cycle at a much lower cost than additional welfare spending.

Our Northern Territory members have also noted that Australia’s system of horizontal fiscal equalisation is based in part on the population within the State or Territory. The Northern Territory’s population has been declining. As a result, the Northern Territory’s share of the GST budget has also declined. These

¹³ Page 247 of the draft report

¹⁴

https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKewjEhPLmuYvIAhUL7XMBHf0fC7gQFjAAegQIARAC&url=https%3A%2F%2Fwww.ruralhealth.org.au%2Fsites%2Fdefault%2Ffiles%2Fpublications%2Fnra-mental-health-factsheet-dec-2017.pdf&usg=AOvVaw30wYw7_OQJL0IFUHkCRfw1

trends are expected to continue. However, the land mass and distances that need to be maintained will not change. The reduced GST income is making it harder to maintain essential economic infrastructure.

If you wish to discuss our comments, please contact Susan Franks on 0401 997 342 or via email at susan.franks@charteredaccountantsanz.com

Yours sincerely

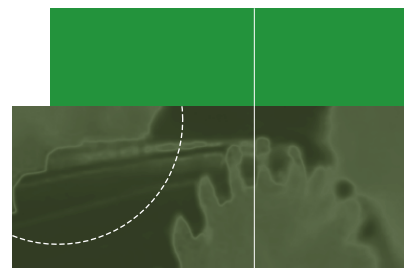


Michael Croker
Tax Leader - Australia

**CONSTITUTIONALITY OF PROPOSED ENTERPRISE
ZONES TO
ENCOURAGE THE INTRODUCTION OF NEW
INDUSTRY AND
THE EXPANSION OF EXISTING INDUSTRY IN
UNDERPERFORMING REGIONAL AREAS**

ADVICE

**PAT BRAZIL
21 MARCH 2001**



**CONSTITUTIONALITY OF PROPOSED ENTERPRISE ZONES TO
ENCOURAGE THE INTRODUCTION OF NEW INDUSTRY AND THE
EXPANSION OF EXISTING INDUSTRY IN UNDERPERFORMING
REGIONAL AREAS.**

1. Summary of Advice

11 We have examined the proposal for Enterprise Zones for Australia contained in the Report entitled “Enterprise Zones for Australia – Achieving Regional Equity through Business Driven Economic Development” prepared by the Institute of Chartered Accountants in Australia (the **Report**) and find that there would be no constitutional impediment to Commonwealth participation in the setting up of such Zones, as proposed, and in particular that there would be no impediment to the Commonwealth providing for tax incentives in such zones.

12 Any reservations that have been expressed in that regard are not soundly based, and are not justified by the totality of existing High Court decisions or by the likely attitude of the present High Court on this matter.

2. The Proposal

21 The proposal would involve not only the Commonwealth Government but also State Governments and Local Government. As set out in the Recommendations in the **Proposal**, it would contain the following elements

The incentive program should include the creation of Enterprise Zones to encourage the introduction of new industry and the expansion of existing industry in under-performing regional areas.

For the purpose of identifying Enterprise Zones, regions should be defined as Local Government Areas, with provision that

- regional groupings of LGA’s should be encouraged, particularly where LGA’s are small in relation to economic regions and
- possibly, that where a large non-eligible LGA adjoins an eligible LGA, and identifiable parts of the large LGA share the disadvantaged status of the eligible LGA, those parts may be considered for inclusion in the enterprise zone.

Appendix A

Declaration as an Enterprise Zone should be available to regions which are experiencing economic distress, particularly high unemployment. Eligibility for enterprise zone assistance should be based on objective criteria of disadvantage which should include

- high unemployment rates, calculated by a broader measure than the standard ABS labour force survey definition, and including allowance for persons working noticeably shorter hours than they would wish and persons not actively looking for work, but who are anxious to join the workforce, including early retirees;
- either as part of the unemployment measure, or separately, allowance should be made for the number of social security claimants likely to be affected by the government's 'mutual obligation' requirements, including persons in work-for-the-dole schemes;
- consideration may be given to low rural land values per farm property as a supplementary indicator in rural areas (defined as those with a high proportion of rural production in GRP) and
- consideration may also be given to favouring areas with significant production in export industries organised on small-business lines (on the grounds that returns to an Enterprise Zone program are likely to be unusually high in such areas).

Regional commitment to an economic development strategy plan should be mandatory for selection as an Enterprise Zone. These strategies and/or plans may require further development following declaration, and should be updated regularly. Provided that it is consonant with the general aims of the enterprise zone program, the development plan may identify particular industries and particular types of investment for support. All incentives offered in the Enterprise Zone should support the development strategy, with particular attention to reducing investment risk.

Enterprise Zones should be financed by the Commonwealth but implemented by state and local governments, subject to Commonwealth guidelines.

Each Enterprise Zone should provide strong incentives to job generation and to investment which is expected to result in job generation, but there should be flexibility for regions to select from a range of acceptable measures and within a broad financial envelope. The merits of providing incentives as tax incentives available only in Enterprise Zones should be considered as an alternative to budgetary expenditures.

Investment incentives in Enterprise Zones should be guaranteed to remain in place for sufficient time to have a full incentive effect, it for at least ten years and preferably 15.

Financial intermediaries should be required to report their investments by region, and should receive incentives (and perhaps regulation) to invest in Enterprise Zones, subject to these investments meeting commercial requirements.

Wage subsidiaries should be a permissible form of expenditure in Enterprise Zones. However, they should only be compulsory component if adopted by the Commonwealth as an adjunct to its social security policies, and then only if the Commonwealth elects to provide them through the enterprise zone program rather than as an independent program. Job generation should, however, be a major aim of regional development strategies, and should be included as a criterion in the assessment of plans and hence the selection of regions to become Enterprise Zones.

There should be provision for increased priority for infrastructure projects in Enterprise Zones, at least as regards infrastructure identified as essential for plan success.

The development of community colleges and similar educational, research and technology diffusion institutions should form a part of the development plan and of the program in each enterprise zone.

Each enterprise zone should be monitored under Commonwealth guidelines. The Zone administration should report on assistance granted and compliance with the conditions under which assistance was granted.

When the enterprise zone program is implemented, Zone Rebates should continue to be provided in the income tax, but the boundaries of the regions of eligibility should be reviewed.

3. The Commonwealth's Constitutional Powers

31 The leading constitutional case to date for schemes of this kind is the *Australian Assistance Plan Case (1975)* 7 ALR 277 (the “*AAP Case*”) which was brought by Victoria against the Commonwealth challenging a not dissimilar proposal. The AAP was not the subject of separate legislation but existed only as an administrative scheme, the features of which were set out in two Discussion Papers and a document entitled “Australian Assistance Plan – Guidelines for Pilot Programme” prepared by a committee of the Social Welfare Commission (established by the *Social Welfare Commission Act 1973*). The AAP provided for the establishment and financing of Regional Councils for Social Development “to assist in the development, within a nationally coordinated framework, of integrated patterns of welfare services”. The Councils were to inquire and report, and also to plan, stimulate and actually provide social welfare services; they employed staff, received grants and had a wide discretion in deciding how to spend the money granted. Councils were set up and were operating in various States, including Victoria.

32 The Victorian challenge to the AAP failed on various grounds but four of the seven judges (McTiernan, Stephen, Mason and Murphy JJ) gave judgments that stand as authority for the proposition that the validity of appropriations for such regional schemes is not ordinarily susceptible to effective legal challenge. Assistance could also be obtained, in defending the present **Proposal**, by relying on what is called the “Nationhood” power to be implied from the Constitution as appertaining to the Commonwealth as a national government, particularly in relation to the expenditure of moneys appropriated by the Commonwealth. Jacobs J in the *AAP Case* said (7 ALR, at 340)):

“The growth of national identity results in a corresponding growth in the area of activities which have an Australian rather than a local flavour. Thus, the complexity and values of a modern national society result in a need for coordination and integration of ways and means of planning for that complexity and reflecting those values. Inquiries on a national scale are necessary and likewise planning on a national scale must be carried out. Moreover,

the complexity of society, with its various interrelated needs, requires coordination of services designed to meet those needs”.

33 Also there has been a significant development in that “regional development” has now been specified in the current Administrative Arrangements Order made by the Governor-General as a matter to be dealt with by a Federal Department of State, namely the Department of Transport and Regional Services. This means that it has been made a subject for the exercise of the executive power of the Commonwealth referred to in Section 61 of the Constitution, a provision that was much discussed in the *AAP Case*, and this provides an additional basis for constitutional support for the **Proposal**.

34 Another important factor in the positive view we take of the constitutionality of the proposal in the Report is that the States are proposed to be involved in setting up the Enterprise Zones. This could make it less likely that a State or States would attempt to challenge the proposal if implemented. State participation could also provide a safe alternative means of delivering parts of the **Proposal** constitutionally, and that would be as part of a State grant’s scheme under Section 96 of the Constitution. Expenditure of Commonwealth moneys under the **Proposal** by way of such grants would be clearly constitutional. In particular, State grants under Section 96 are not caught by the limited prohibitions in the Constitution against discrimination or preference as between States or parts of States.

4. **Constitutional Prohibitions Against Discrimination and Preference as Between States and Parts of States.**

41 The prohibitions are contained in Sections 51(ii) and 99 of the Constitution. They read:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

(ii) Taxation; but so as not to discriminate between States or parts of States:

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Appendix A

42 The first thing to note is that these prohibitions only apply to laws and regulations of a limited kind – namely those made under the inter-State and overseas trade and commerce power in Section 51(i) of the Constitution and tax laws made under Section 51(ii). As already noted, they do not apply to State grants under Section 96 of the Constitution, if they do not discriminate between States: *Moran's Case* (1939) 61 CLR 735 at 763 (High Court) and (1940) 63 CLR 338 at 348-9 (Privy Council).

43 This still leaves the possibility that tax incentives and other incentives that deal with overseas or interstate commerce in the proposed Enterprise Zones might conflict with Sections 51(ii) and 96. As to what is meant in this regard by a **preference** or **discrimination** against a State or part thereof, in *Elliott v Commonwealth* (1936) 54 CLR 657 the majority of the High Court thought a preference was invalidated by section 99 only if given to localities which are taken as States or parts of States as such (at 675) or are selected by virtue of their character as parts of a State. This had been the view of Isaacs J speaking of the prohibition of discrimination in section 51(ii) in *The King v Barger* (1908) 6 CLR 41 and by the majority of the Court in *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68. Isaacs J said (at 107):

“The pervading idea is the preference of locality merely because it is locality, and because it is a particular part of a particular State. It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities; and there is nothing, in my opinion, to prevent the Australian Parliament, charged with the welfare of the people as a whole, from doing what every State in the Commonwealth has power to do for its own citizens, that is to say, from basing its taxation measures on considerations of fairness and justice, always observing the constitutional injunction not to prefer States or parts of States”.

44 Subsequently in *Clyne's Case* (1958) 100 CLR 246 which involved a specific challenge to federal income tax zonal concessions, Dixon CJ, Williams, Kitto and Taylor JJ begged to differ from *Elliott* and Isaacs J, saying they were unable to appreciate the distinction between the selection of an area and the selection of the same area for the same purpose ‘as part of a State’ (at 266). However, the

challenge failed on other grounds, and income tax zonal concessions to residents of defined areas in the States have continued to apply ever since. The view expressed in *Elliott* was questioned but not overruled.

45 This being the state of play in the High Court, there has been a relevant development that helps significantly in resolving the difference of judicial views in a way that supports the constitutionality of the **Proposal**. This is the decision of the United States Supreme Court in *United States v Ptasynaski* (1983) 62 US 74. It dealt with the provision in the United States Constitution requiring “taxes be uniform throughout the United States”, on which Sections 51(ii) and 96 of our Constitution was based. The decision concerned the US *Crude Oil Windfall Profit Tax Act* of 1980 which exempted from the tax imposed by the Act domestic crude oil defined as oil produced from wells located north of the Arctic Circle or on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline system. The US Supreme Court unanimously held that this exemption did not violate the Uniformity Clause’s requirement that taxes be “uniform throughout the United States”:

- The Uniformity Clause did not require Congress to devise a tax that falls equally or proportionately on each State nor did the Clause prevent Congress from defining the subject of a tax by drawing distinctions between similar cases (at 80-82).
- Identifying “exempt Alaskan oil” in terms of its geographic boundaries did not render the exemption invalid. Neither the language of the Uniformity Clause nor previous decisions prohibited all geographically defined classifications. That Clause gave Congress wide latitude in deciding what to tax and did not prohibit it from considering geographically isolated problems. Congress could not be faulted for determining, based on neutral factors, that “exempt Alaskan oil” required separate favourable treatment. Such determination reflected Congress’ considered judgment that unique climatic and geographic conditions required that oil produced from the defined region be exempted from the windfall profit tax which was devised to tax “windfalls” that some oil producers would receive as the result of the deregulation of domestic oil prices that was part of the Government’s program to encourage the exploration for and production of oil (at 84-86).

5. Conclusion

51 We conclude therefore that the present High Court would accept that there would be no constitutional impediment to the Commonwealth's participation in setting up the Regional Enterprise Zones proposed in the **Proposal**.

52 The recent trend of the Court towards looking at the purpose and effect of government initiatives in determining constitutional validity extends to taking notice of social facts, as shown in *Castlemaine Tooheys Ltd v South Australia* (1990) 90 ALR 371. In that case weight was a given to United States decisions and doctrines, and this seems to us to be a similar situation in that regard. Even more pertinently, reference is made in the judgment of Gaudron and McHugh JJ to the meaning of discrimination for constitutional purposes in the following terms (at 387-388):

“...a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to difference or differences which support the distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there were no such difference, or in other words if it treats equally things that are unequal – unless perhaps there is no practical basis for the differentiation.”

53 The present **Proposal** is firmly based on the relevant social facts, and these would be taken into account if there were a challenge. The attachment following demonstrates that the Federal Government has made regional development a main item in its programs and budgets. Material of this kind could be taken into account in any challenge.

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'Regional Development as an Established feature of Federal Programs and Budgets'

1. Introduction

11 The recent trend towards looking at the purpose and effect of legislation to determine its constitutional validity, makes an examination of surrounding facts even more pertinent (Zines, *The High Court and the Constitution*, 4 ed at 481). This was done in *Castlemaine Tooheys Ltd v South Australia* (1990) 90 ALR 371, and a similar approach is appropriate in relation to the present **Proposal** which addresses the national concern for regional development.

12 This Appendix gives pertinent examples of the development of Australian policy and practice in this area as a type of 'Brandeis Brief', in support of the constitutional argument in the Advice. It does not purport to be exhaustive and in particular it does not supercede or alter what is contained in the **Proposal** itself.

13 It provides an overview of current Australian policy and practice regarding regionalism, with some specific and pertinent examples.

2. Regionalism in Australia

21 Regionalism has existed in Australia since at least the 1930s, with tax reforms that provided concessions for those living in rural and remote zones (these concessions continue to the present day, and are elaborated on below). Regionalism was given a further boost by the Whitlam Government in the 1970's, particularly through the AAP, and by subsequent governments.

22 The House of Representatives Standing Committee on Primary Industries and Regional Services produced a report in February 2000 entitled "Time Running Out : Shaping Regional Australia's Future" ("Time Running Out"). This report concluded that there is an urgent need to "firstly acknowledge the deficiencies in infrastructure that exist throughout regional Australia and secondly, the need to remedy that lack of infrastructure.". The Report examined the basis for its conclusion that investment in Australia needed to focus on regions:

Attachment

“Regional economies throughout the world are facing global pressures that, combined with rapid technological advances, increasing productivity growth from commodity sectors and the need to ensure environmentally sustainable development, bring the prospect of spiralling decline for those regions suffering skills loss, reduced investment and, notably, lack of infrastructure...A new regional policy framework is urgently needed in Australia to address the cycle of increasing prosperity for high-performing regions and decline for other regions caught in low income, low employment growth patterns.”

- 23 Inherent in the above description of economic conditions is the effect of globalisation. The Federal Government has recognised the need to incorporate regionalism into its overall economic, fiscal and developmental policies and initiatives, noting that ‘Regional infrastructure is vitally important to ensuring the continuation or, in many cases, the rejuvenation, of economic development not only in the regions, but for the nation as a whole.’ (“Time Running Out”).
- 24 This awareness is reflected in the announcement, reported in “The Australian Financial Review” on 14 March 2001, that the Federal Government was planning a “far reaching review of policies for regional Australia, including new ‘zonal’ tax concessions...The Deputy Prime Minister (and Minister for Transport and Regional Services), Mr John Anderson, is leading the push to find better ways to target and coordinate existing rural assistance programs which cost the Government about \$2b annually”.
- 25 In addition, a media release from Senator Richard Alston (20/6/99) announced the Government’s “Accessing the Future” initiatives to “meet the Government’s commitment to revitalise regional Australia by improving and restoring services. The initiatives, funded from the proposal next 16.66% Telstra sale, would expand regional opportunities for employment, business, research and development, education and information services.” The initiatives include:
- Rural Transaction Centres
 - Television Fund to extend SBS-TV to Australians in regional areas

- Building IT strengths, to address current market failures and policy gaps that are preventing optimal growth of new and developing innovative Australia IT&T businesses.
- Building Additional Rural Networks (BARN) to expand and promote improvement in the services, quality and price of regional telecommunications services

26 A joint statement on 9 May 2000 by the Deputy Prime Minister and Senator the Hon Ian MacDonald (Minister for Regional Services, Territory and Local Government), entitled "Regional Australia: Making a Difference", further emphasised the Federal Government's support for regional communities. In particular the statement noted that "The Federal Government acknowledges that there is a clear role for the Commonwealth in encouraging regional development and coordination beyond ensuring the national economic fundamentals are sound."

27 Issues associated with regionalism recur in the work of the House of Representatives Standing Committee on Primary Industries and Regional Services, and also in the functions of the Department of Transport and Regional Services (DOTRS). This includes encouraging government departments to take account of regional activities and needs.

28 DOTRS also funds a range of initiatives focused specifically on the needs of regional Australia. These include:

Countrylink Australia : an information access service for country people relating to their entitlements and obligations.

Flood Recovery Fund : extra support is provided to rural and regional communities in flood affected areas

Regional and Rural Women's Unit : aims to increase the participation of women in the community in leadership roles and government decision making
 Regional Communities Programmes : initiatives to strengthen regional and rural Australia
 Research and Development Programs for rural and regional Australia: The programmes' objectives are to improve the availability and application of research and data on rural social and economic issues to foster community development activities.

Reference : www.dotrs.gov.au/regional (DOTRS Website)

Attachment

- 29 Importantly, all relevant Federal government policy submissions must now include a Regional Impact Statement (RIS) and the Government is developing memoranda of understanding to ensure that programs across Government have maximum benefits for regional and rural Australia.
- 210 Regionalism is clearly becoming an important consideration in other areas of government policy. A compelling example of this is the strong theme of regionalism in the 2000-2001 Commonwealth Budget, which contained a number of initiatives focused specifically on regional Australia. A Wine Equalisation Tax Rebate Scheme was introduced to assist small wine makers in regional Australia, and the Fuel Sales Grant Scheme was introduced, whereby grants are provided to fuel retailers for sales to consumers in non-metropolitan areas with a higher rate of grant provided for sales in remote areas. Also, the Remote Air Service Subsidy Scheme, which provides regular services to remote ports through Australia, had its funding doubled. In addition, the Budget strongly supported continued investment in regional infrastructure, regional industry development, and regional tourism programmes.
- 211 The Australian tax system contains two further tax rebates which are based on regional considerations. The long standing tax rebate under s79A of the *Income Tax Assessment Act 1936* provides for a rebate of tax for individual taxpayers who reside or stay in certain areas of Australia. The rebate is in recognition of uncongenial climatic conditions, isolation and the high cost of living encountered by residents of these areas in comparison to the rest of Australia : Tax Ruling 94/28. That Ruling provides a list of all points that fall within Zone A and B, which are deemed 'special areas' attracting the rebate. Tax Ruling 94/27 provides guidelines to assist in determining an individual taxpayer's eligibility for a zone rebate under s79A. Another tax rebate is available to telephone subscribers in remote areas who do not enjoy the 'benefits of untimed local calls' (\$169pa).

- 212 Telstra also features investment on regional basis. Over four years to 30 June 2000, Telstra has invested \$5.5b in telephone network in regional Australia. Telstra has also invested \$1.5b in 1999/2000 to support regional customers. This has included the Remote Australia Telecommunications Enhancement (RATE) Program to upgrade radio telephone systems, and Telstra's commitment, announced in April 2000, to spend an additional \$350m over 3 years to upgrade rural access networks : Media Release, DOTRS, June 1999.

Appendix B

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