

## **Submission to Productivity Commission Study into Remote Area Tax Concessions and Payments**

I welcome the Commission's study and provide the following brief submission focused on the zone tax offset.

The zone tax offset is effectively a payment to some taxpayers who choose to live part of the year further away from most taxpayers, funded by the latter. This is of course geographic discrimination, and I would argue inequitable. I understand the Commission will consider the economic and social questions associated with this transfer – such as equity and measures of remoteness. But as the Commission's terms of reference also go to the 'appropriate ongoing form and function' of the offset, its legal foundation also needs to be explored.

I submit that the zone tax offset is unconstitutional. On my reading, it offends at least three provisions of the Constitution<sup>1</sup> clearly intended to prevent geographic discrimination. These are worth quoting here:

### **Legislative powers of the Parliament**

51. (ii) taxation; but so as not to discriminate between States or parts of States;

### **Commonwealth not to give preference**

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.

### **Rights of residents in States**

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

The constitutionality of the zone tax offset has not yet been tested, in part because those with legal standing to bring forward a case (that is, the recipients) have no incentive to have their payment cancelled. A remote-living plaintiff of similar character to Bryan Pape<sup>2</sup> may be required to take the question to the High Court. However unlikely, such a case could render the offset with no ongoing form and function at all.

The Commission's study provides an opportunity to raise these, and no doubt other, questions on the constitutionality of the zone tax offset (as well as the remote area concessions and remote area allowance). In the first instance and in the interests of public consideration, I ask the Commission to engage senior counsel for a formal opinion, and to publish that opinion with the study.

**Simon Kerr**

20 February 2019

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<sup>1</sup> Commonwealth of Australia Constitution Act

<sup>2</sup> Pape v Commissioner of Taxation [2009] HCA 23