Dear Sir,

Thank you for the opportunity to make a submission to the Inquiry into Remote Area Tax Concessions and Payments.

It is my opinion that the existing Remote area Tax Concessions and Payments are possibly unconstitutional. I support the submission made by Simon Kerr.

Section 51(ii) of the Constitution gives the Commonwealth powers with respect to: *Taxation; but so as not to discriminate between States* ***or parts of States****:* (emphasis added).

This is reinforced by Section 99 of the Constitution: *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*** (emphasis added).

The late Peter Clyne[1] challenged the constitutionality of the precursor of Zone Tax Offsets in 1957 and 1958, and argued their existence made the entire Income Tax Act unconstitutional.

Dixon CJ described Clyne's case in these terms:

It is based on the assertion that there is a failure to observe both the condition of the power given by s. 51(ii.) that there shall be no discrimination between States or parts of States and the command of s. 99 of the Constitution that the Commonwealth shall not by any law or regulation of revenue give preference to one State or any part thereof over another State or any part thereof. The discrimination or preference which the defendant claims to have discovered has nothing to do with the circumstances of his particular case but, of course, he can as a person sued for tax rely upon it if it be true that it brings down the whole edifice of income tax. It lies in s. 79A of the Assessment Act, a section which few persons in the more populous parts of Australia have occasion to read or notice. Section 79A (1) states that for the purpose of granting residents of the prescribed area an income tax concession in recognition of the disadvantages to which they are subject because of the uncongenial conditions and high cost of living in a zone called A and to a lesser extent in a zone called B in comparison with parts of Australia not included in the prescribed area, an amount ascertained in accordance with the section should be an allowable deduction.

Dixon CJ decided: ***I repeat that I assume that s. 79A of the schedule does attempt to give such a preference and so to discriminate*** (emphasis added). *But this can affect the validity of the Taxing Acts only if s. 79A ever became part of the Assessment Act upon which the Taxing Acts operated. In my opinion this hypothesis or condition never was fulfilled. My opinion is that s. 79A was invalid ab initio and never became a valid portion of the Assessment Act. Let it be assumed to the full that the provisions of s. 79A would involve a preference forbidden by s. 99 once the Taxing Act operated upon them. It appears to me that, because s. 79A would if valid necessarily involve such a preference once the Taxing Act operated upon it, the consequence must be that it never was within the competence of the Parliament to enact s. 79A. It must therefore be treated as void. It is, I think, equally true that without s. 99 s. 79A on the hypothesis stated would be outside the competence of Parliament because it would conflict with the condition expressed in s. 51 (ii.) that a law with respect to taxation must not discriminate between States or parts of States.*

[1] Federal Commissioner of Taxation v Clyne [1958] 100 CLR 246 (2 April 1958)

While this decision was based on the precursor of the Zone Rebate offset, it is probable that the current Zone Allowance system is also unconstitutional, and does not form a valid part of the tax law. Section 99 of the Constitution may also make Drought Relief Payments and other similar payments invalid.

Robert Douglas
8 March 2019