a critical analysis of whether the zone tax offset contravenes the australian constitutional prohibition on taxes that discriminate between states or parts of states

Paper 38 – Public Law Seminar

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# I Introduction

 Undeterred by the prohibition contained in section 51(ii) of the *Australian* *Constitution* requiring Commonwealth taxation laws ‘not to discriminate between States or parts of States’,[[1]](#footnote-1) the Commonwealth Parliament amended income tax legislation in 1945 to grant a concession, now called the zone tax offset, to individuals who reside in certain geographically specified zones.[[2]](#footnote-2) These zones are not coterminous with state and territory borders and progressively favour the more remote areas of Australia. While this zone tax offset might *prima facie* appear to discriminate between parts of states, its constitutional validity has never been conclusively determined by an Australian court.

 Traditionally, the discrimination prohibition has been understood as requiring the provisions of taxation laws to be geographically uniform. Taxation laws would ‘discriminate’ for the purposes of the *Constitution* if their terms ‘provided for the application of different rules according to locality.’[[3]](#footnote-3) In the most recent decision of the High Court of Australia on the prohibition, *Fortescue Metals Group Ltd v Commonwealth*, the plurality judgment of Hayne, Bell and Keane JJ adhered to that orthodox interpretation.[[4]](#footnote-4) In contrast, French CJ formulated a new, ‘modern, substantive understanding of discrimination’[[5]](#footnote-5) in the context of section 51(ii): differential treatment that is not ‘appropriate and adapted to a proper objective.’[[6]](#footnote-6) Given that the Court agreed unanimously on the result, it left for another day the issue of which interpretation should prevail. Ostensibly, the Chief Justice’s interpretation represents the only possible constitutional lifeline for the zone tax offset, but whether that is in fact the case has not been critically analysed.

In this essay I will address that issue and argue that the zone tax offset is constitutionally valid. In Part II, I will explore the relevant constitutional and legislative background. Then, in Parts III-VI, I will analyse the relevant explanatory materials to the *Constitution*, the jurisprudence regarding provisions related to section 51(ii), the jurisprudence regarding section 51(ii) itself and the jurisprudence of foreign courts regarding equivalent prohibitions. These sources show that section 51(ii) operates in a more sophisticated manner than simply requiring provisions of taxation laws to be geographically uniform. Rather, section 51(ii) prohibits differential treatment of persons, solely on the basis of their state connection, regardless of any other circumstance, provided that such treatment is not appropriate and adapted to proper objectives. Finally, in Part VII, I will argue that the zone tax offset is constitutionally valid because it does not impose differential treatment solely on the basis of state connection and is appropriate and adapted to the attainment of two proper objectives: encouraging development of remote Australia and compensating residents of remote areas for the disadvantages of uncongenial climatic conditions, isolation and high cost of living.

# II Constitutional and Legislative Context

## A Section 51(ii) and Related Constitutional Provisions

 Discriminatory taxation laws are prohibited by the words of the *Constitution* that grant the Commonwealth Parliament power to tax. Section 51(ii) of the *Constitution* relevantly provides that:

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: … taxation; but so as not to discriminate between States or parts of States; …

The term ‘States’ is effectively defined to mean the original six colonies that federated as well as the Northern Territory.[[7]](#footnote-7) Neither the term ‘discriminate’ nor the expression ‘parts of States’ is defined in the *Constitution*. Guidance on these matters must be obtained from elsewhere.

 One source of guidance is the wider constitutional context. Section 51(ii) forms part of two networks of related provisions: one establishing an Australian economic union and the other establishing *de minimus* equality guarantees.[[8]](#footnote-8) These two networks are not mutually exclusive. The provisions that form part of these networks are divisible into two functional categories: grants to the Commonwealth Parliament of exclusive legislative powers and restrictions on the powers of the Commonwealth and state Parliaments and governments.

In terms of exclusive legislative powers, the Commonwealth Parliament may forbid any preference or discrimination by a state in relation to railways that is adjudged by the Inter-State Commission to be undue and unreasonable or unjust to any state.[[9]](#footnote-9) Further, the Commonwealth was required to impose uniform duties of customs and excise by 1903, at which point its legislative powers to impose such duties and to grant bounties on the production or export of goods, which it held since Federation in 1901, became exclusive of the states.[[10]](#footnote-10)

Turning to the restrictions, in addition to the section 51(ii) discrimination prohibition, any bounties granted by the Commonwealth Parliament must be uniform throughout the Commonwealth.[[11]](#footnote-11) These prohibitions are effectively extended to all Commonwealth laws of revenue, trade and commerce as well as actions of the Commonwealth executive government by section 99, which provides:

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.

Other sections of the *Constitution* require that trade, commerce and intercourse among the states be absolutely free,[[12]](#footnote-12) and that residents of one state shall not be subject to any disability or discrimination in another state that would not be equally applicable to them if they were a resident of that other state.[[13]](#footnote-13)

 Given this context, section 51(ii) cannot be interpreted in isolation. Because section 51(ii) forms part of two networks of interrelated provisions, a common interpretative approach should apply to those provisions to the extent that the particular words, context and purpose of each provision permit. As Professor Saunders argued, ‘the various usages of the [discrimination] concept clearly have enough in common to warrant a general consistency in approach unless a reason to depart from it is shown.’[[14]](#footnote-14) At the very least, the approach adopted in relation to one provision should be relevant to determining the approach to the others. The interpretative approach adopted by the High Court in relation to section 51(ii)’s related provisions is considered in Part IV.

## B Income Tax

 For each income year, a person’s income tax liability is calculated as follows:[[15]](#footnote-15)

Income tax = (Taxable income x Rate) – Tax offsets

where

Taxable income = Assessable income – Deductions

Taxpayers may be entitled to two types of concessions: deductions (allowances) and offsets (credits). Offsets are generally more valuable to taxpayers because they are subtracted directly from the amount of tax that would otherwise be payable, whereas a deduction for the same amount would only decrease the amount of taxable income on which tax is assessed. However, as many offsets are non-refundable and cannot be carried forward, deductions can be more valuable to taxpayers in an overall loss position or with income below the $18,200 tax-free threshold because a deduction increases carry forward losses.

## C Zone Tax Offset

Each income year, residents of isolated areas are entitled to an offset in accordance with section 79A of the *Income Tax Assessment Act 1936* (Cth) (‘*ITAA 1936*’).[[16]](#footnote-16) In the 2012-13 income year, 556,850 individuals were assessed as being eligible for this zone tax offset, which resulted in the Commonwealth forgoing $286,932,680 in income tax.[[17]](#footnote-17) The offset is restricted to individuals; companies and trustees cannot claim it.[[18]](#footnote-18) An individual will be considered a resident of an isolated area for an income year if their usual place of residence was within that area for more than half of that income year.[[19]](#footnote-19)

There are three geographically defined areas of Australia to which the offset applies: ‘Zone A’, ‘Zone B’ and ‘the special area’ (collectively defined as the ‘prescribed area’).[[20]](#footnote-20) Zone A consists of the northern third of Australia as well as the external territories.[[21]](#footnote-21) Zone B consists of the central third of Australia and western Tasmania.[[22]](#footnote-22) The special area consists of those parts of Zones A and B that are 250 kilometres or more by the shortest practicable surface route from the nearest urban centre with a population of 2,500 or greater (according to the 1981 census data of the Australian Bureau of Statistics).[[23]](#footnote-23) No part of Victoria or the Australian Capital Territory forms part of the prescribed area.



**Figure 1**: Map of the original zone boundaries (bold lines) and state and territory borders (dashed lines).[[24]](#footnote-24)

 The quantum of the zone tax offset varies depending upon the zone in which an individual is resident, the extent to which they are entitled to a dependant (invalid and carer) offset or a notional dependant offset (the combined total of which is defined to be the ‘relevant rebate amount’) and whether they receive any social security payments for living in remote areas (called ‘remote area allowances’).[[25]](#footnote-25) The offset amount for residents of: the special area is $1,173 plus 50% of their relevant rebate amount; Zone A is $338 plus 50% of their relevant rebate amount; or Zone B is $57 plus 20% of their relevant rebate amount, in all cases reduced by the amount of any remote area allowances.



**Figure 2**: Map of the current zone boundaries (bold lines) with state and territory borders (dashed lines).[[26]](#footnote-26)

If the offset exceeds a taxpayer’s income tax liability in one income year, the balance is neither refundable, transferable to another nor able to be carried forward or backwards.[[27]](#footnote-27) Consequently, individuals in a loss position resident in the prescribed area are unable to obtain any value from the offset, but could obtain value from an equivalent deduction (in the form of higher carry forward losses).

## D Historical Views on the Constitutionality of the Zone Tax Offset

From the very beginning, there was a cloud over the constitutionality of the zone tax offset. During the second reading speech of the Bill that inserted section 79A into the *ITAA 1936*, the Opposition queried its constitutionality prompting the Treasurer to respond: ‘I have been assured that the proposal is constitutionally sound.’[[28]](#footnote-28) Nevertheless, the constitutional validity of section 79A has been challenged only once. In *Commissioner of Taxation v Clyne*, the taxpayer sought to avoid income tax by arguing that the *ITAA 1936* as a whole was invalid because section 79A discriminated between parts of states. It was ‘a forlorn hope’,[[29]](#footnote-29) which would have brought ‘down the whole edifice of income tax.’[[30]](#footnote-30)

Unsurprisingly, given that drastic consequence, the High Court unanimously rejected the taxpayer’s argument. However, the majority did so on technical grounds related to the invalidity of partially unconstitutional amending legislation without considering whether, in substance, section 79A discriminated between parts of states.[[31]](#footnote-31) Only Webb J held that section 79A did not discriminate between states or parts of states, finding instead that it differentiated between natural or business circumstances that operate with difference force in different localities.[[32]](#footnote-32)

There has been very little extra-judicial commentary on the zone tax offset’s constitutional validity. Rose and Professors Lane and Gray concluded (for slightly different reasons) that the offset was unconstitutional,[[33]](#footnote-33) while Professor Sawer and Evans more tentatively suggested that the offset might be unconstitutional.[[34]](#footnote-34) The only comprehensive inquiry into the zone tax offset ‘noted there was doubt about the issue and that it could have no assurance that the provision was constitutionally sound.’[[35]](#footnote-35) It concluded that *prima facie* ‘section 79A might seem to go counter to the spirit, at least, of sections 51(ii) and 99 of the Constitution.’[[36]](#footnote-36)

Given this doubt, it is perhaps surprising that there have not been more challenges to the constitutional validity of the offset, ‘though this may be more for procedural reasons’.[[37]](#footnote-37) A person who is not eligible to receive the zone tax offset may not have standing, while a person who is eligible would have no desire to deprive themselves of the offset’s financial benefit.[[38]](#footnote-38) State attorneys-general would have standing to challenge the offset’s validity, but may not wish to do so if it advantages their state or they receive other benefits from the Commonwealth.[[39]](#footnote-39) Alternatively, the costs of challenging the offset might be considered disproportionate to any discriminatory effect its small quantum creates.

# III Explanatory Materials

 Having explored the relevant constitutional and legislative context, it is necessary to determine the correct interpretation of the section 51(ii) prohibition on discrimination. In this Part, I will argue that the explanatory materials to the *Constitution* show that its framers intended to prohibit differential treatment of persons (rather than the states as polities) purely on the basis of their state connection, regardless of any other circumstance, if such treatment was not appropriate and adapted to a proper objective. Contemporary materials explaining section 51(ii) are limited to the Constitutional Convention debates and original commentaries on the *Constitution*.

Precursor clauses to the section 51(ii) discrimination prohibition were approved at each of the Constitutional Conventions of the 1890s.[[40]](#footnote-40) Originally drafted to require that taxation laws be uniform throughout the Commonwealth, it was not until the 1898 Melbourne Convention that the prohibition was even mentioned. In Melbourne, Edmund Barton proposed that the uniformity requirement be replaced with a prohibition on discrimination. This was the result of the concurring opinion of Field J in *Pollock v Farmers’ Loan & Trust Co*, which interpreted the requirement contained in article 1 § 8(1) of the *United States Constitution* that duties be ‘uniform throughout the United States’ strictly to invalidate taxes that included exemptions of particular classes of taxpayer or tax-free thresholds.[[41]](#footnote-41)

Barton explained that the change was necessary because ‘[w]hat is really wanted is to prevent a discrimination between *citizens of the Commonwealth in the same circumstances*’, which he explained as ‘any form of tax which would make a difference between the citizen of one state and the citizen of another state’.[[42]](#footnote-42) Barton’s amendment was agreed without debate.[[43]](#footnote-43) Writing soon after Federation, Professor Moore argued that the uniformity requirement had been changed to a discrimination prohibition because the former ‘was more than the federal spirit required; it prevented not merely discrimination among the States, but discrimination in the case of individuals’ and for this reason the final Convention ‘adopted terms of geographical limitation.’[[44]](#footnote-44)

This change from a uniformity requirement to a discrimination prohibition, as well as the justification for the change, provides important guidance on the proper interpretation of section 51(ii).[[45]](#footnote-45) Firstly, it connotes that uniformity is a stricter test than discrimination, meaning that non-uniform laws may still be non-discriminatory. Secondly, Barton’s reference to ‘discrimination between citizens’ suggests that discrimination involves the differential treatment of persons and not the states as polities.[[46]](#footnote-46) Finally, Barton’s reference to ‘in the same circumstances’ contemplates that taxation laws could still treat people differently on the basis of circumstances other than their particular state connection and not contravene section 51(ii).

 While the explanatory materials that deal exclusively with section 51(ii) do not provide any guidance on the relevance of objectives and proportionality to section 51(ii), the explanatory material regarding the conceptually identical prohibition in section 99 supports the idea that objectives and proportionality will be relevant to determining whether differential treatment constitutes discrimination. Nonetheless, the relevance of that material to section 51(ii) could be disputed,[[47]](#footnote-47) particularly since the High Court held in *Elliott v Commonwealth* that ‘[p]reference necessarily involves discrimination or lack of uniformity’ but ‘it does not follow that every discrimination … is a preference’.[[48]](#footnote-48)

This reasoning has been described as ‘exasperating’[[49]](#footnote-49) and, so far as it applies to taxation laws, appears flawed on a number of grounds. Firstly, the section 99 prohibition on preferences applies to laws of revenue (including taxation),[[50]](#footnote-50) trade and commerce. *Elliott* did not involve a taxation or revenue law; rather, a law of trade and commerce. Accordingly, any statements regarding the relationship between sections 51(ii) and 99 are *obiter*. That point is particularly important given that all of the cases concerning the validity of taxation laws prior to *Elliott* had treated sections 51(ii) and 99 as coextensive.[[51]](#footnote-51)

Secondly, the criteria proffered in *Elliott* for distinguishing between discrimination and preference (namely, ‘tangible *commercial* advantage’[[52]](#footnote-52) or ‘material or sensible benefit of a *commercial or trading* character’[[53]](#footnote-53)) appear solely directed at laws with respect to *trade* and *commerce*. How those criteria could apply to laws of revenue is unclear and has never been explained. Any differential treatment in taxation laws will necessarily confer commercial advantage or benefit on someone, somewhere, in the form of reduced taxation. It follows that, even applying the *Elliott* test, all discrimination in taxation laws will necessarily result in preference.

 Moreover, attempting to distinguish between sections 51(ii) and 99 is contrary to the original intention of the framers of the *Constitution*. Quick and Garran stated that: ‘[a]s regards taxation, the prohibition against preferences adds little, if anything, to the provision in sec. 51-i[i]’ but merely ‘extends to all laws and regulations of trade, commerce, and revenue, the condition which is elsewhere imposed with regard to laws dealing with taxation – viz., that they shall not discriminate between States or parts of States.’[[54]](#footnote-54) Accordingly, there are no grounds on which to maintain the false dichotomy between the discrimination and preference prohibitions in sections 51(ii) and 99.

 As such, the explanatory materials regarding section 99 are equally relevant to section 51(ii). While recognising that neither section expressly refers to the objectives or proportionality of differential treatment, Quick and Garran conclude that they are inherent in the concepts of discrimination and preference:

If a difference of treatment is arbitrary, or if its purpose is to advantage or prejudice a locality, it is undue and unreasonable, and is accordingly a preference. *If on the other hand the difference of treatment is the reasonable result of the dissimilarity of circumstances – or if it is based on recognized and reasonable principles of administration – it is no preference*. *The intention and the effect must both be looked to in order to decide whether a preference exists; and in neither inquiry can reasonableness be ignored.*[[55]](#footnote-55)

Consequently, the available explanatory materials to the *Constitution* show that the framers intended the section 51(ii) discrimination prohibition to prevent differential treatment of persons on the basis of a connection with a state, regardless of any other circumstances, if that treatment was not appropriate and adapted to a proper objective.

# IV Jurisprudence on Related Provisions

 Reference to the High Court’s recent jurisprudence on the provisions related to section 51(ii) shows that, in the last 28 years, the High Court has confirmed that sections 92, 99 and 117 of the *Constitution* all prohibit differential treatment that is not appropriate and adapted to the attainment of a proper objective, despite each section being worded differently. Given that together with section 51(ii) these sections form part of the network of provisions that establish the Australian economic union and *de minimus* equality guarantees, the same interpretative approach should be applied to section 51(ii).

 To begin with, the injunction in section 92 that trade, commerce and intercourse among the states must be absolutely free has been interpreted to prohibit ‘discriminatory burdens in the protectionist sense’.[[56]](#footnote-56) Discrimination, in this context, ‘commonly involves the notion of a departure from equality of treatment’ but ‘[i]t does not follow that every departure from equality of treatment … would … form discriminatory burdens.’[[57]](#footnote-57) Rather, discrimination requires differential treatment which is not ‘necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare’ or some other ‘acceptable explanation or justification.’[[58]](#footnote-58)

 A similar interpretative approach has been adopted in relation to section 117, which renders legislation ineffective to the extent that it subjects residents of a particular state to any disability or discrimination. In *Street v Queensland Bar Association*, every member of the High Court acknowledged that not all differential treatment on the grounds of state residence would constitute discrimination. Their Honours effectively defined discrimination as differential treatment that was not appropriate and adapted to a proper objective.[[59]](#footnote-59) Each justice defined the limits of proper objectives in different ways, but the theme common to all of their reasoning was that the objectives and proportionality of differential treatment are relevant to determining whether there is discrimination.

Most recently, Quick and Garran’s understanding of section 99 preference, detailed in Part III above, was effectively adopted by the High Court in *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)*. In that case, the joint majority held that a preference requires ‘differential treatment … that is [not] the product of distinctions that are appropriate and adapted to a proper objective.’[[60]](#footnote-60)

If objectives and proportionality are relevant to determining whether sections 92, 99 or 117 have been breached, then they must also be relevant to determining whether section 51(ii) has been breached. There is no reason why differential treatment contained in a taxation law that is appropriate and adapted to a proper objective would be more harmful to the Australian economic union and constitutional *de minimus* equality guarantees than differential treatment in a law regarding inter-state intercourse, trade and commerce or the rights of residents. Put simply, doctrinal consistency supports the interpretative approach to section 51(ii) adopted by French CJ in *Fortescue*.

# V Jurisprudence on Section 51(ii)

## A Introduction

 Importantly, the High Court and Privy Council jurisprudence on the meaning of the section 51(ii) discrimination prohibition is limited in number, mostly aged and characterised by narrow fact patterns and equally narrow reasoning. Writing about the jurisprudence immediately prior to *Fortescue*, Simpson argued that ‘[t]he decided cases concerning section 51(ii), none of which are recent, confine the limitation narrowly.’[[61]](#footnote-61) Similarly, Saunders described the jurisprudence as ‘a narrow range of somewhat tedious cases.’[[62]](#footnote-62)

Castan and Joseph argued that the narrow interpretation is causative of ‘[t]he dearth of litigation regarding ss 51(ii) and 99’.[[63]](#footnote-63) In turn, Saunders saw the narrow interpretation and sparing application of those provisions to be at least partly the result of the fact that ‘they presented novel problems of interpretation and threatened results which were considered unwelcome.’[[64]](#footnote-64) This recognises that the High Court engaged in consequentialist reasoning, which does not necessarily produce doctrinal consistency. To complicate the process of distilling general principles from the jurisprudence, Professor Gray has noted that academic commentary on the discrimination prohibition is ‘sparse’.[[65]](#footnote-65)

The High Court in *Fortescue* recognised that ‘[t]here are relatively few decisions about the meaning and application of the limiting words of s 51(ii)’[[66]](#footnote-66) and that the decisions on the prohibitions in sections 51(ii) and 99 ‘do not yield single, simply expressed and exhaustive explanations and definitions of the limitations on legislative power imposed by those provisions.’[[67]](#footnote-67) Consequently, before examining the reasoning of these decisions and attempting to distil from them the proper interpretation of section 51(ii), it will be useful to specify their collective limitations.

Firstly, apart from *Fortescue*, all of the cases are old and contain reasoning that would be unlikely to find favour in modern times. As Simpson noted, the cases prior to *Fortescue* ‘were decided well before the wider corpus of law began to take substantive discrimination seriously and … this might limit their relevance today.’[[68]](#footnote-68) Secondly, in no case regarding section 51(ii) has a court been required to consider taxation laws that *by their terms* differentiate between parts of states; all of the cases involved uniform taxation laws or taxation laws that imposed differential treatment coterminous with state borders. Thirdly, the factual circumstances of the cases before the Court have generally fallen within two narrow categories: a complete absence of differential treatment or clear differential treatment that could never be justified by any objective. Accordingly, it has generally been unnecessary for the Court to even consider whether the objectives of the treatment are relevant to determining whether it is discriminatory.

Bearing these limitations in mind, a critical analysis of the jurisprudence reveals two fundamental points about the proper interpretation of the section 51(ii) discrimination prohibition. Firstly, to discriminate means to impose differential treatment on the basis of a connection with a state regardless of any other circumstances. Secondly, the objectives and proportionality of taxation laws are relevant to determining whether they discriminate between states or parts of states.

## B Differential Treatment Due to State Connection

What constitutes differential treatment for the purposes of section 51(ii) has been the subject of detailed analysis in only two of the High Court’s decisions because in every other case the conclusion was obvious. The first disputed case of differential treatment was *R v Barger*. Itinvolved a challenge to the validity of the *Excise Tariff 1906* (Cth), which imposed excise duties on various items. The Tariff exempted from duty items manufactured by workers who were remunerated at a fair and reasonable rate approved by either: resolution of the Commonwealth Parliament; an industrial award of the Commonwealth Court of Conciliation and Arbitration; an industrial agreement between an employer and their employees; or declaration of a Commonwealth judge, state judge or state industrial authority. Such approvals might only apply to particular employers or be limited to particular areas of Australia. Barger argued that this exemption discriminated between states and parts of states.

 Adopting a substance over form approach, Griffith CJ, Barton and O’Connor JJ held that the exemption was discriminatory. While noting that the exemption applied generally throughout Australia, they emphasised that it effectively conferred discretion upon various Commonwealth and state authorities (and, presumably, also employers and employees by way of agreement) to create different conditions for exemption in different localities by approving different rates of fair and reasonable remuneration.[[69]](#footnote-69) Accordingly, the exemption effectively discriminated between states and parts of states. This reasoning focused on the treatment of individual taxpayers rather than the states as polities: the same rule applied across all states, but it would require individual manufacturers to pay different rates of remuneration to secure the exemption. As such, the majority’s reasoning supports the view that taxation laws with uniform terms may still indirectly discriminate in substance.

 Isaacs and Higgins JJ dissented in separate judgments that focused on the form of the exemption. Isaacs J presented two reasons why the Tariff was non-discriminatory. The primary reason was that section 51(ii) prevented differentiation between localities ‘because [each] is a particular part of a particular State.’[[70]](#footnote-70) Without further explanation, Isaacs J asserted that ‘no one could possibly suggest’ the Tariff made such differentiation.[[71]](#footnote-71) The secondary reason was inherent in the meaning of discrimination:

Discrimination between localities in the widest sense means that, because one man [or woman] or his [or her] property is in one locality, then, *regardless of any other circumstance*, he [or she] or it is to be treated differently from the man [or woman] or *similar* property in another locality.[[72]](#footnote-72)

Applying this definition to the facts, Isaacs J concluded that manufacturers in different locations were in different circumstances for the purposes of calculating fair and reasonable remuneration. Accordingly, a uniform exemption from duty for goods manufactured by employees paid fair and reasonable remuneration did not discriminate between parts of states simply because local circumstances would be a relevant consideration when determining fair and reasonable remuneration. Higgins J reasoned in a similar manner.[[73]](#footnote-73)

 Neither line of reasoning adopted in *Barger* is entirely comprehensible or compelling. The majority’s reasoning was technically *obiter* given their prior conclusion that the Tariff was not even a taxation law.[[74]](#footnote-74) That conclusion was reached by applying the reserved powers doctrine, under which the Commonwealth’s legislative powers were subject to an implied limitation that prevented direct interference with state legislative powers. That doctrine ‘has long since been discredited.’[[75]](#footnote-75) It is difficult to dispute that the doctrine had at least some influence on the majority’s discrimination reasoning.[[76]](#footnote-76) Their objection to the Tariff was that the Commonwealth Parliament was effectively seeking to regulate intra-state industrial relations (a power ‘reserved’ to the states). As the exemption was fundamental to effecting that regulation, it was the combined focus of both the reserved powers doctrine and discrimination reasoning. Moreover, the majority conflated the reserved powers doctrine with discrimination by characterising the exemption as a delegation by the Commonwealth Parliament of ‘*power* to make … discrimination’,[[77]](#footnote-77) which is a power state Parliaments retain.[[78]](#footnote-78)

Tainting influence of the reserved powers doctrine aside, the majority’s discrimination reasoning is also logically flawed. The Tariff was said to discriminate because employers in different localities would have to pay different rates of remuneration to secure the exemption. Effectively, this interpretation requires taxation laws to operate with uniform *effect* across Australia. Taken to its logical extension, it requires that any tax concession (exemption, offset or deduction) be available to all taxpayers for the same cost. That is so fundamentally contrary to the drafting history of section 51(ii), the subsequent jurisprudence of the High Court and the long history of taxation laws in Australia that it must be incorrect. As Professor Sawer concluded without elaboration: ‘the majority decision on this point in *Barger* was almost certainly wrong.’[[79]](#footnote-79) This was reinforced in *Fortescue* where the plurality declined to support the *Barger* majority’s conclusion and Kiefel J held that ‘[t]here may be something to be said for the view that the approach of Isaacs J in *Barger* is more consonant with the decisions in *Cameron* and *Irving*.’[[80]](#footnote-80)

Nor is the reasoning of Isaacs J immune from criticism. Isaacs J proffered no guidance on how to determine whether localities have been selected *because they are states or parts of states*. As a result, Isaacs J’s primary reasoning has been criticised for creating a ‘special criterion of “Stateishness”’[[81]](#footnote-81) that is ‘difficult – perhaps impossible – to grasp’.[[82]](#footnote-82) Indeed, it was ‘trenchantly criticized’ in *Clyne* by Dixon CJ,[[83]](#footnote-83) who stated he was ‘unable to appreciate the distinction’.[[84]](#footnote-84) Moreover, the reasoning ‘frustrate[s] the original intention of the prohibitions of s. 51(ii) and s. 99’[[85]](#footnote-85) because the Commonwealth can circumvent their effect by identifying areas by characteristics other than state status.[[86]](#footnote-86) Finally, it seems unlikely that such formalistic reasoning would be applied by a modern court. The majority in *Permanent Trustee* did not even mention the Stateishness criterion, despite it being an additional justification for their conclusion.

Once these unconvincing aspects of *Barger* are rejected, all that remains to provide guidance on the proper interpretation of section 51(ii) is Isaacs J’s definition of discrimination in the widest sense: differential treatment of people in different locations regardless of any other circumstances. Indeed, that definition was applied either expressly or impliedly by every member of the Court in *Cameron v Deputy Federal Commissioner of Taxation (Tas)*, which concerned a regulation that prescribed different deduction values for livestock located in different states (purportedly based on state-wide average values).[[87]](#footnote-87) In these circumstances, the differential treatment was obvious and the Court found the regulation discriminated between states.

In determining whether differential treatment exists, the reasoning of the majority and dissentients in *Barger* supports the inference that section 51(ii) is primarily concerned with the treatment of persons rather than the states as polities. Furthermore, the majority’s substance over form approach and conclusion that an Act with uniform terms may still discriminate appear sufficiently general and untainted by the reserved powers doctrine to remain valid. As Simpson notes, ‘the emergence of a preference for attention to substance over form in discrimination analysis and its having been picked up in constitutional contexts is, I think, an entirely acceptable and desirable development.’[[88]](#footnote-88) Accordingly, section 51(ii) prohibits both direct and indirect discrimination.

All of these conclusions are confirmed by the reasoning in *Conroy v Carter*, which also dealt with differential treatment. That case concerned the administrative arrangements for collection of a Commonwealth levy imposed on owners of commercial hens. The relevant Act empowered the Commonwealth to enter into arrangements with each state for its egg board to collect the levy. While such an arrangement subsisted, taxpayers in that state were required to pay levies to the state egg board and the board could retain from any money it owed to a taxpayer the amount of any Commonwealth levy for which they were liable. Carter claimed these provisions discriminated between states. By statutory majority, the High Court agreed.[[89]](#footnote-89)

Delivering the leading judgment, Menzies J held that the section 51(ii) prohibition did not require tax laws to operate uniformly throughout the Commonwealth; rather, it forbade taxation laws ‘which would *impose a taxation burden upon a person because of some connexion with a State or a part of a State*, which would not fall upon other persons not having that connexion.’[[90]](#footnote-90) Effectively, this is an application of Isaacs J’s definition of discrimination in *Barger*. While Menzies J only referred to burdens, logic requires that his reasoning also extends to benefits. In economic substance, benefits to one person or class are the same as burdens imposed on everyone else. This logic may have been behind Kiefel J’s conclusion in *Fortescue* ‘that s 51(ii) also prohibits a benefit which applies differentially as between States.’[[91]](#footnote-91)

The Court unanimously upheld the ability of state egg boards to collect levies on the basis that having different collection agencies in each state imposed no additional burden on taxpayers.[[92]](#footnote-92) However, the majority held that the power of state egg boards to retain money owed to taxpayers and transfer it to the Commonwealth was discriminatory because it constituted a particular disadvantage to hen owners in states which had concluded an arrangement with the Commonwealth.[[93]](#footnote-93) In contrast, the minority held that this power was non-discriminatory because it operated generally throughout the Commonwealth.[[94]](#footnote-94) The majority focused on the substantial operation and effect of the uniform Act, while the minority focused on its uniform terms.

Rose observed that ‘[t]he reasoning in the case is not clear, but the conclusion can be supported on the ground that such a law is invalid if the Commonwealth is free not to make an arrangement with a State requesting one.’[[95]](#footnote-95) Despite this lack of clarity, a number of propositions arise from the majority’s conclusion that the Act did discriminate between states, particularly in light of the fact that, while the uniform terms of the Act did not treat *the states* differently, they did treat *taxpayers* differently depending upon whether their state had concluded an arrangement with the Commonwealth. Firstly, Castan and Joseph observed that while *Conroy* involved no direct discrimination, ‘there is no doubt the Act did indirectly discriminate’.[[96]](#footnote-96) Thus, section 51(ii) prohibits both direct and indirect discrimination. Consequently, an Act with uniform terms may nevertheless discriminate between states. Secondly, in determining whether such discrimination exists, a substance over form approach is adopted. Finally, section 51(ii) protects persons rather than the states as polities.[[97]](#footnote-97)

## C Relevance of Objectives and Proportionality

 In addition to clarifying the differential treatment prohibited by section 51(ii), the existing jurisprudence shows that the objectives and proportionality of taxation laws are relevant to determining whether such laws discriminate between states or parts of states. In *Colonial Sugar Refining Co Ltd v Irving*, the taxpayer challenged the validity of uniform Commonwealth excise duties. In what was obviously an attempt to avoid double or cumulative taxation, the relevant Tariff exempted from duty items on which state excise duty had already been paid.[[98]](#footnote-98) Some states imposed excise duties (at rates that were either higher or lower than the Commonwealth rates), while others did not. Effectively, the Tariff treated manufacturers in different states differently: it imposed liability to duty on manufacturers in some states but not in others. Colonial contended that this discriminated between the states.

 Both the Full Court of the Supreme Court of Queensland and the Privy Council held that the Tariff did not discriminate between states. For the Full Court, this was because the exemption applied generally across Australia.[[99]](#footnote-99) Importantly, the Court also held that the objective of the exemption was to avoid cumulative or double taxation and that this ‘is cogent as showing that there is no substantial basis for the objection in point of justice.’[[100]](#footnote-100) Delivering the judgment of the Privy Council, Lord Davey rejected an argument that the exemption was ‘arbitrary and indefensible’, by referring expressly to its objective and proportionality:

The substance of the enactment in question is that goods which have already paid customs or excise duties shall not pay over again, and some such provision is *obviously necessary* in the transition from the old order to the new. ... The exemption from the new excise duties on the ground of previous payment of customs duties *seems justifiable and right* in establishing a system based on the absolute freedom of trade among the States, and the substitution of a uniform excise for all inter-State duties on goods as well as what are strictly excise duties.[[101]](#footnote-101)

Significantly, both courts identified the objective of avoiding double or cumulative taxation and found that it was a proper basis upon which to differentiate between taxpayers. The Privy Council went further and referred to the necessity of the exemption, which is an integral element in modern proportionality tests. This shows that objectives and proportionality are an integral part of the section 51(ii) prohibition on discrimination.

 Similar reasoning was applied by the Privy Council in *W R Moran Pty Ltd v Deputy Commissioner of Taxation (NSW)*. That case involved a complicated scheme of legislation passed by the Commonwealth and states designed to establish a minimum price for wheat. Integral to this scheme was the imposition of a Commonwealth excise duty on flour and wheat payable by millers, the proceeds of which were appropriated by separate legislation and granted to the states on the condition that they distribute the money to wheat farmers in proportion to the quantity of wheat they had produced. Acknowledging that Tasmania produced very little wheat, the scheme effectively exempted Tasmanian millers (and, indirectly, consumers) from duty, by the Commonwealth appropriation legislation permitting all duty collected in Tasmania to be refunded. Overall, the scheme imposed excise duty across Australia, except Tasmania.

 A majority of the High Court of Australia focused on the form of the scheme rather than its substance. The majority emphasised that the section 51(ii) discrimination prohibition applies only to taxation laws, not appropriation laws, and that the excise duty in this case applied uniformly across Australia. Thus, the excise duty did not discriminate between states.[[102]](#footnote-102) Echoing *obiter* statements in *Barger* and *Cameron*,[[103]](#footnote-103) Latham CJ emphasised that because the legislative power to tax is not purposive, the purpose of a taxation law is irrelevant to its validity; it followed that ‘the presence of a purpose to discriminate would equally be nothing to the point.’[[104]](#footnote-104) Similarly, Starke J stated that ‘the motives which actuated the legislature, the end desired, and the indirect effect of [an] Act were all equally irrelevant.’[[105]](#footnote-105)

On appeal, the Privy Council upheld the decision of the High Court but rejected key aspects of its reasoning. In a ‘somewhat obscure’ speech,[[106]](#footnote-106) Viscount Maugham held that when determining the validity of a scheme of legislation, the courts must consider the real substance and purpose of the scheme as a whole (meaning its scope, ultimate effect and function).[[107]](#footnote-107) His Lordship found that the exemption of Tasmanian taxpayers was ‘in its purpose and substance unobjectionable’ because it was enacted ‘for the *purpose of equalizing the burden on the inhabitants of Tasmania* of taxation which was being imposed on all millers throughout the Commonwealth for *an end which might reasonably be considered to be both just and expedient*.’[[108]](#footnote-108) Consequently, the objectives and proportionality of the laws in *Moran* were relevant to determining whether they discriminated for the purposes of section 51(ii).

This division of opinion between the High Court and Privy Council on the relevance of objectives and proportionality was reflected in the division of opinion between French CJ and the plurality in *Fortescue*. *Fortescue* involved a challenge to a Commonwealth project-based tax on profits from the extraction of specified minerals called the Minerals Resource Rent Tax (MRRT). The MRRT legislation granted taxpayers the equivalent of an offset for the amount of state or territory royalties paid on the extraction of taxable minerals. Royalty rates varied between states and territories. Fortescue argued that this meant the MRRT discriminated between states. Aside from French CJ, each member of the Court effectively held that the offset was non-discriminatory because it applied uniformly across Australia and that any differential effect it had between taxpayers was the result of the state royalties legislation.[[109]](#footnote-109)

 Given that these members of the Court had concluded that the MRRT legislation imposed no differential treatment, it was unnecessary for them to consider the relevance of objectives and proportionality. Crennan and Kiefel JJ did not, while the plurality did. Proceeding from the starting point that section 51(ii) mandates the relevant comparator for discrimination (namely, states or parts of states), it followed, the plurality reasoned, that section 51(ii) is a prohibition ‘cast in absolute terms’, which excludes consideration of objectives and proportionality:

*s 51(ii) may be read as assuming that there are no differences between States (or parts of States) which could warrant a law with respect to taxation distinguishing between them*. ... If this is the assumption that underpins s 51(ii), it would follow that, if a law with respect to taxation does discriminate between States (or parts of States), no further question could arise about whether the distinction that the law created or drew might none the less be explained or justified in a way that would take the challenged law outside the qualifying words of the provision. And if no further question of that kind need be answered, there would be no occasion to identify or consider the relationship that the law may have with some object or end which is identified as ‘proper’ or ‘legitimate’, because there could be no object or end that could constitute or reflect some difference between States (or parts of States) which would justify distinguishing between them.[[110]](#footnote-110)

The plurality’s starting premise, that section 51(ii) is an absolute prohibition because it mandates a comparator, forms the lynchpin of their reasoning. It is unclear why a provision that mandates a comparator must inexorably be absolute and exclude consideration of objectives and proportionality. Sections 92 and 99 of the *Constitution* also mandate the same comparator, but the Court has not held that they are absolute. Quite the contrary: it has held that the objectives and proportionality of differential treatment are relevant to determining whether those sections have been breached.[[111]](#footnote-111) Consequently, Simpson has described the plurality’s reasoning as ‘puzzling’, ‘anomalous’ and ‘inadequate’, arguing that it ‘is certainly not, alone, a solid basis for departing from a consistent line of reasoning in related contexts over 25 years.’[[112]](#footnote-112)

Even if this inconsistency is ignored, problems remain with the way the plurality has identified the relevant comparator for section 51(ii). By arguing that any differential treatment between states constitutes discrimination, their Honours appear to be proceeding from an unstated premise that the expression ‘states or parts of states’ means the states as polities and not peoples connected with the states.[[113]](#footnote-113) This premise leads to the inevitable conclusion that every person in Australia is relevantly comparable at all times and for all purposes. This premise and conclusion are contradicted by the drafting history of section 51(ii), the High Court’s past jurisprudence and logic.

During the Convention debates on section 51(ii), Deakin emphasised that the ‘commonwealth consists of the people’ and that ‘the people of the commonwealth … are also the people of the several states’.[[114]](#footnote-114) Accordingly, reference to states in section 51(ii) means peoples connected with states. Similarly, Quick and Garran noted that section 51(ii) was verbally amended in the final stages of the Melbourne Convention to remove the reference to discrimination ‘between persons’ because those words were ‘superfluous’.[[115]](#footnote-115) This implies that the framers of the *Constitution* considered the reference to ‘States or parts of States’ in section 51(ii) as implicitly referring to people connected with the states. Thus, the original intention was for section 51(ii) to protect people, not the states as polities.

The same point was made by Deane J in *Leeth v Commonwealth*: ‘[i]t is the people who, in a basic sense, now constitute the individual States’.[[116]](#footnote-116) French CJ in *Fortescue* held that section 51(ii) has a federal purpose that includes ‘the formal equality in the Federation of the States inter se *and their people*.’[[117]](#footnote-117) Evoking Isaacs J’s definition of discrimination, Crennan J was even more unequivocal, finding that section 51(ii) had a ‘federal rationale of *protecting* *taxpayers* *in the same circumstances* in the various States’.[[118]](#footnote-118) These statements recognise that the beneficiaries of the protection afforded by section 51(ii) are people connected with the states. It follows that the relevant comparator for identifying prohibited discrimination is a hypothetical person in exactly the same circumstances as the complainant, except that they do not share the same state connection.

In the context of income tax, logic also suggests that this conclusion must be correct. Commonwealth income tax is not imposed on the states; it is imposed on natural persons and corporate entities.[[119]](#footnote-119) None of the major cases challenging taxation laws pursuant to section 51(ii) have been brought by the states; they have all been brought by individual taxpayers.[[120]](#footnote-120) Both of these facts support the idea that the protection of section 51(ii) is granted to people and not the states as polities. It follows that for Commonwealth taxation laws to discriminate between states they must discriminate between persons on the basis of their state connection and not on the basis of some other circumstance.

 For all of these reasons, the preferable view is that of French CJ:

The limitations imposed by ss 51(ii) and 99 … operate at a level of generality appropriate to their federal purposes. ... *The generality of the non-discrimination and no-preference limitations permits differences between States in the application of the law,* ***for which the law makes provision****, if such provision is based upon a distinction which is appropriate and adapted to the attainment of a proper objective*.[[121]](#footnote-121)

Far from adopting ‘an innovative route’,[[122]](#footnote-122) French CJ’s conclusion that the objectives and proportionality of taxation laws are relevant to determining whether the section 51(ii) discrimination prohibition has been breached is consistent with the reasoning of the courts in *Colonial* and *Moran*.

## D Conclusion

 Despite the limitations of the existing jurisprudence, a number of guiding principles regarding the proper interpretation of section 51(ii) are apparent. Discrimination was defined by Isaacs J in *Barger*: differential treatment of a person because of their particular state connection regardless of any other circumstance. That definition has been consistently endorsed and applied, expressly or impliedly, in every case since then. The objectives and proportionality of a taxation law will also be relevant in determining whether it is discriminatory according to the reasoning in *Colonial*, *Moran* and *Fortescue*.

Importantly, discrimination and uniformity are distinct concepts. As the High Court held in *Conroy*, taxation laws need not operate uniformly to satisfy the prohibition on discrimination, although as *Barger* and *Conroy* show, uniform terms may be insufficient to prevent discrimination in substance. As such, the prohibition applies to both direct and indirect discrimination. As a corollary, in determining whether section 51(ii) is breached, the courts adopt a substance over form approach, as exemplified by the reasoning in *Barger*, *Moran*, *Conroy* and *Fortescue*. It follows that the prohibition applies equally to burdens and benefits.

Finally, *Barger* is authority for the proposition that the expression ‘States or parts of States’ means geographical locations and does not import some special criterion of ‘Stateishness’. All of the cases make clear that section 51(ii) protects persons connected to states, rather than the states as polities, and that discrimination is identified by examining the treatment of persons rather than the states. Accordingly, the relevant comparator for identifying section 51(ii) discrimination is a person.

# VI Comparative Jurisprudence

## A Introduction

 In this Part I will argue that the relevant comparative jurisprudence of other countries supports the relevance of objectives and proportionality to the section 51(ii) discrimination analysis. Firstly, I will show that Australia’s constitutional structure is not analogous to those of the United Kingdom (UK), New Zealand, Canada and the European Union (EU) so the discrimination jurisprudence of those jurisdictions is irrelevant. In contrast, the constitutional structure of the United States of America (US) and the drafting history of the section 51(ii) discrimination prohibition show that decisions of the US Supreme Court are relevant to understanding section 51(ii). Secondly, I will show that the jurisprudence of the US Supreme Court still permits proportionate differential treatment on a geographical basis if justified by a proper objective.

## B Relevant Jurisdictions

 Australia is a common law country with a written, entrenched constitution that establishes a federation. That constitutional context combined with the wording of section 51(ii) necessarily restricts the subset of relevantly comparable foreign jurisprudence. Despite the common law tradition of the UK and New Zealand, both are unitary states without a written, entrenched constitution. Parliamentary supremacy means that the Parliaments of both countries are free to enact taxation laws that discriminate between different locations. There is simply no equivalent concept of internal taxation discrimination in their constitutions or the jurisprudence of their courts. Consequently, the jurisprudence of these jurisdictions cannot assist in interpreting section 51(ii).

 Nor is the jurisprudence of the EU or Canadian courts relevantly comparable. The EU is a federation of 28 member states.[[123]](#footnote-123) Whereas no provision of the EU’s constitutive treaties invests any one of its supranational institutions with a power to impose taxes across the Union,[[124]](#footnote-124) there are provisions of the treaties that could limit the ability of its member states to impose taxes that discriminate on a geographical basis, namely, the fundamental freedoms and the state aid rules.[[125]](#footnote-125) Nevertheless, none of these restrictions are truly equivalent to the discrimination prohibition in section 51(ii). Importantly, they are not restrictions on the taxing powers of a *federal* Parliament; rather, they are restrictions on the taxing powers of the constituent member states. Section 51(ii)only restricts the Commonwealth Parliament, not the state Parliaments. As Latham CJ noted in *Moran*, the validity of states granting state aid in the form of reduced taxes ‘would not be open to doubt.’[[126]](#footnote-126)

Even if that is ignored, the provisions of the EU’s constitutive treaties differ markedly from section 51(ii). The state aid rules and many of the fundamental freedoms do not even use the word or concept of ‘discrimination’.[[127]](#footnote-127) Moreover, the freedoms are expressly made subject to limitations justified on the basis of public policy, public security, public health, the objectives of the EU (provided they are compatible with the internal market) or taxpayer residence.[[128]](#footnote-128) Similarly, the state aid rules expressly permit aid to promote the economic development of areas with abnormally low standards of living or serious underemployment and specified external territories.[[129]](#footnote-129) These exceptions mandate the Court of Justice of the EU (CJEU) to consider the objectives and proportionality of any limitation on freedom or state aid. No such interpretative approach is mandated by section 51(ii).

Turning to Canada, there is also no constitutional provision equivalent to the section 51(ii) discrimination prohibition.[[130]](#footnote-130) Indeed, the division of mutually exclusive taxation powers between the federal Parliament and the provincial Legislatures in the *Constitution Act 1867* is fundamentally different to the concurrent taxation powers of the Commonwealth Parliament and state Parliaments in the *Australian* *Constitution*. For this reason, Quick and Garran noted at Federation that Canadian jurisprudence is less applicable and less valuable as an aid to interpretation of section 51(ii) than US Supreme Court jurisprudence.[[131]](#footnote-131) Consequently, the jurisprudence of the CJEU and the Supreme Court of Canada are not relevant to the interpretation of section 51(ii).

 In contrast, the US is a common law, federal state with a written, entrenched constitution, which contains a similar prohibition to section 51(ii): article 1 § 8(1) of the *United States Constitution* relevantly provides that the US Congress ‘shall have power to lay and collect taxes, duties, imposts and excises … but all duties, imposts, and excises shall be uniform throughout the United States.’ Both sections confer legislative power to tax, but restrict that power. This similarity is no coincidence: the Australian provision was modelled upon its US counterpart and the last minute change in the drafting of the Australian provision (from uniformity to discrimination) was prompted by a decision of the US Supreme Court.[[132]](#footnote-132) Indeed, Quick and Garran considered the two provisions to be ‘practically the same in substance’.[[133]](#footnote-133)

 Despite this, the willingness of the High Court to refer to US Supreme Court decisions has ‘varied considerably’.[[134]](#footnote-134) While not expressly eschewing reference to US Supreme Court jurisprudence, the plurality in *Fortescue* did adopt an observation that the American and Australian provisions ‘may not be the same’[[135]](#footnote-135) to conclude that ‘[d]ifferent outcomes may be sufficient to demonstrate lack of uniformity but may not suffice to show discrimination.’[[136]](#footnote-136) However, as that negative conclusion implicitly recognises, and the drafting history of section 51(ii) confirms, the difference between the US concept of uniformity and the Australian concept of discrimination is that uniformity is a *stricter* requirement.[[137]](#footnote-137) Accordingly, US decisions that taxes *do not* breach the stricter uniformity requirement should be relevant to interpreting the section 51(ii) discrimination prohibition.

Moreover, there has been a recent resurgence in the willingness of the High Court to refer to the jurisprudence of foreign courts, particularly the US Supreme Court with respect to legislative powers similar to those in the *Australian* *Constitution*.[[138]](#footnote-138) Given the similarities between the Australian and US constitutions, in cases involving issues of discrimination or fiscal federalism, US Supreme Court decisions are at the very least a useful source of potential guidance.[[139]](#footnote-139) Consequently, the better view is that of French CJ and Crennan J in *Fortescue*, who expressly held that decisions of the US Supreme Court on the uniformity requirement ‘are appropriate sources of comparative constitutional law’ and ‘shed some light on’ section 51(ii).[[140]](#footnote-140)

## C US Supreme Court Jurisprudence

 An examination of the US Supreme Court jurisprudence indicates that the objectives and proportionality of differential treatment are relevant to determining whether the uniformity requirement has been breached. In *United States v Ptasynski*, the Supreme Court entertained a challenge to an excise duty on the production of oil that exempted oil from wells in the Arctic Circle or north of the Alaska-Aleutian Range and at least 75 miles from the Trans-Alaska Pipeline System. The Court held that the exemption did not violate the uniformity requirement.

Delivering the unanimous opinion, Powell J summarised the previous jurisprudence as establishing the principle that Congress had authority to determine the class of subjects of taxation, but that a tax must apply at the same rate wherever that class is found.[[141]](#footnote-141) His Honour held the uniformity requirement ‘gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems’, but warned that ‘where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is *actual geographical discrimination*.’[[142]](#footnote-142)

In order to determine whether differential treatment imposed by the exemption amounted to such discrimination, Powell J identified the objective of the exemption by referring to its legislative history and then held the exemption was proportionate:[[143]](#footnote-143)

Congress clearly viewed ‘exempt Alaskan oil’ as a unique class of oil that, consistent with the scheme of the Act, merited favorable treatment. It had before it ample evidence of the disproportionate costs and difficulties – the fragile ecology, the harsh environment, and the remote location – associated with extracting oil from this region. We cannot fault its determination, *based on neutral factors*, that this oil required separate treatment. Nor is there any indication that Congress sought to benefit Alaska for reasons that would offend the purposes of the [uniformity] Clause. Nothing in the Act’s legislative history suggests that Congress intended to grant Alaska *an undue preference* at the expense of other oil-producing States.

On this basis, the Court held that the Act was non-discriminatory and thus satisfied the uniformity requirement. If differential treatment along geographical lines justified by ‘neutral factors’ does not produce ‘an undue preference’ and satisfies the uniformity requirement, it follows that it should also satisfy the less strict prohibition on geographical discrimination. At the very least, *Ptasynski* shows that mere differential treatment along geographical lines should not amount to section 51(ii) discrimination.

# VII Constitutional Validity of the Zone Tax Offset

## A Introduction

 Once it is accepted that the explanatory materials to the *Constitution*, the jurisprudence of the High Court and the relevant comparative jurisprudence of foreign courts all support the same interpretation of the section 51(ii) discrimination prohibition, the next step is to apply that interpretation to determine whether the zone tax offset discriminates between states or parts of states. The issue is whether the zone tax offset imposes differential treatment along geographical lines that is not appropriate and adapted to the attainment of a proper objective.[[144]](#footnote-144)

Importantly, the criterion of proper objective and proportionality is not ‘a qualification justifying a law which would otherwise exceed the constitutional limitations’ but rather ‘a criterion for characterisation of a law as discriminatory for the purposes of s 51(ii).’[[145]](#footnote-145) The analysis requires ‘holistic balancing’ of all relevant criteria rather than a ‘two-stage defeasibility model’ under which proportionate implementation of proper objectives excuse otherwise discriminatory differential treatment.[[146]](#footnote-146) As such, differential treatment on the one hand and objectives and proportionality on the other are equal and integral elements in characterising whether taxation laws are discriminatory.

In this Part I will argue that the offset cannot be characterised as discriminatory for two reasons. Firstly, it does not impose differential treatment on taxpayers *in the same or similar circumstances*. Secondly, despite not being as efficient as it could be, the offset *is appropriate and adapted to the attainment of proper objectives*, namely the development of remote Australia and compensation of individuals who reside there.

## B Differential Treatment

 Viewed superficially, the zone tax offset appears to treat taxpayers differently on the basis of their state connection by dividing Australia into four zones that each comprise different parts of different states. None of the previous jurisprudence regarding section 51(ii) involved laws that on their face differentiated between parts of states in this way. Nevertheless, it is instructive that in both *Barger* and *Conroy* (the two cases in which the Court divided on the issue of differential treatment) the minority emphasised the form of the law as not creating any differential treatment, whereas the majority emphasised the substantive operation of the law as creating differential treatment.

Effectively, the majorities in both *Barger* and *Conroy* held that ostensible formal equality may be belied by the substantive and practical operation of a taxation law that produces differential treatment. Logically, it should follow that ostensible formal differential treatment may be belied by the substantive and practical operation of a taxation law that produces equal treatment. As Crennan J stated succinctly in *Fortescue*, ‘it is necessary to consider the “real substance and effect”, not just the form, of the tax.’[[147]](#footnote-147) Moreover, as French CJ stated in *Fortescue*, section 51(ii) will not necessarily be breached by ‘differences between States in the application of the law, *for which the law makes provision*’.[[148]](#footnote-148)

 In propounding the proper interpretative approach to section 51(ii), French CJ invoked the reasoning of cases that embody a standard concept of discrimination the High Court applies in constitutional, statutory and common law contexts, which Simpson has coined the Court’s ‘universal conception of discrimination’.[[149]](#footnote-149) This conception ‘favours a flexible view of “alikeness” in the construction of specific rules along with a substance-focused approach to their application.’[[150]](#footnote-150) The universal conception cases emphasise that differential treatment involves ‘the unequal treatment of equals or the equal treatment of those who are not equals’.[[151]](#footnote-151) This definition mandates the identification of an appropriate comparator. In undertaking that task, the universal conception cases recognise context will be extremely relevant.[[152]](#footnote-152)

In the case of the zone tax offset, that context is provided by the terms of the section 51(ii) discrimination prohibition and the income tax legislation. For the reasons already given in Parts V(C) and V(D), the section 51(ii) discrimination prohibition must be seen as a protection for persons. Therefore, in the specific context of the zone tax offset, discrimination requires a comparison of the treatment of individual income taxpayers connected with different locations.[[153]](#footnote-153) Nevertheless, it does not follow that all taxpayers with any connection to any location are relevantly comparable. As the explanatory materials and prior jurisprudence recognises, section 51(ii) prevents discrimination between persons *with the same connection to a state location and in the same circumstances*. In addition to their state location, each taxpayer has a variety of circumstances which may be relevant to determining whether they are comparable for the purposes of section 51(ii). An appropriate comparator must have all of an individual’s attributes except their state connection.

 By focusing on the substantive and practical operation of the zone tax offset and recognising that the relative remoteness of each individual taxpayer’s residence is an additional circumstance or attribute relevant to them, the only conclusion is that section 79A imposes no differential treatment. In substance, section 79A grants all individual taxpayers in Australia an offset which increases correlative to their remoteness. Individual taxpayers are not treated differently purely on the basis of locality or state affiliation, but on the economic and social consequences associated with the remoteness of their residence.

Put in the language of the universal conception, section 79A treats equals equally and unequals unequally by granting all remote residents an offset and denying all non-remote residents an offset regardless of state connection. Persons in remote New South Wales are treated in the same way as persons in remote Queensland; persons in non-remote Western Australia are treated in the same way as persons in non-remote South Australia; and persons in remote Tasmania are treated differently to persons in non-remote Tasmania. The conclusion that non-remote and remote individual taxpayers are not relevantly comparable is consistent with the High Court’s universal conception of discrimination, which deems affirmative action programmes permissible.[[154]](#footnote-154)

Understood in this way, the zone tax offset is no more discriminatory in substance than income tax concessions currently granted to primary producers.[[155]](#footnote-155) While in form these concessions are available to all individuals in Australia, in substance they apply only to individuals in areas of arable farmland. However, such primary production concessions do not discriminate between parts of states. This is because, while they treat taxpayers in different locations differently, they do so having regard to circumstances other than location, namely the business that the taxpayer conducts. The same reasoning can justify the conclusions in *Colonial* and *Fortescue* that differential effects produced by uniform legislation do not constitute differential treatment.[[156]](#footnote-156)

For these reasons, the zone tax offset does not impose differential treatment between states or parts of states. It treats all relevantly comparable taxpayers equally and non-comparable taxpayers differently.

## C Proper Objectives

Only four Australian cases have considered the proper objectives criterion in the context of taxation discrimination: *Colonial, Moran, Permanent Trustee* and *Fortescue*. However, the reasoning in those cases provides no methodology for determining whether the objectives of taxation laws are proper. In the context of a different constitutional prohibition, the High Court has held that legislative objectives will be proper if they are compatible with the objectives of the constitutional prohibition.[[157]](#footnote-157) By parity of reasoning, it seems that when seeking to determine whether a taxation law has proper objectives, the Court would engage in the normal process of statutory construction of the law and then determine whether its objectives are compatible with the objectives of the section 51(ii) discrimination prohibition.

 To this end, French CJ in *Fortescue* succinctly outlined the objectives of the section 51(ii) discrimination prohibition. His Honour held that section 51(ii) ‘protect[s] the formal equality in the Federation of the States inter se and their people, and the economic union which came into existence upon the creation of the Commonwealth’[[158]](#footnote-158) and prohibits ‘laws which make distinctions between States or parts of States which are inconsistent with the economic unity of the Commonwealth and the status of the States and their people as equals inter se in the Federation.’[[159]](#footnote-159) Yet despite setting out this general principle, French CJ did not expressly apply it to the facts.

Instead, his Honour merely recited the objectives section of the MRRT legislation, which referred to ensuring the Australian community received an adequate return on its taxable resources by taxing above normal profits taking into account the extent to which they were otherwise subject to taxation, and then asserted that this objective was proper.[[160]](#footnote-160) Put simply, the objective was ensuring an appropriate level of taxation. French CJ’s reasoning did not articulate *why* that objective was proper, in particular, whythat objective was compatible and consistent with the Australian economic union and equality of the states and their peoples. This lacuna has been described as ‘[s]omewhat strange’.[[161]](#footnote-161) Interestingly, Kiefel J indicated that the objectives section provided little assistance in the proper construction of the MRRT legislation, markedly noting that the term ‘above normal profits’ was not defined.[[162]](#footnote-162)

 Earlier decisions of the courts on the proper objectives criterion provide an insight into the range of objectives that will be compatible with section 51(ii).[[163]](#footnote-163) In *Colonial*,both courts held that avoiding cumulative or double taxation was a proper objective.[[164]](#footnote-164) In *Moran*, the Privy Council held that the objective of equalising the burden of taxation throughout Australia was a proper objective.[[165]](#footnote-165) In *Permanent Trustee*, a joint majority of the High Court held that Commonwealth mirror taxation legislation, which effectively applied the taxation legislation of each state to any Commonwealth places within that state,[[166]](#footnote-166) did not breach the prohibition on preferences between parts of states in section 99 because the differential treatment the legislation imposed on Commonwealth places in each state compared with those in the other states was appropriate and adapted to a proper objective.[[167]](#footnote-167) Their Honours apparently considered the proper objective of the mirror taxation legislation to be the assimilation of taxation laws that apply in Commonwealth places with those that apply in the surrounding state. Put simply, the objective was consistency. However, in none of *Colonial*, *Moran* or *Permanent Trustee* did the courts articulate *why* the relevant objective was proper beyond simply asserting that it was.

 In terms of identifying the objective of the zone tax offset, section 79A as enacted was unusual in that it contained an express statement of its objective. These words have remained unaltered since 1945 and provide that the zone tax offset exists:

For the purpose of granting to residents of the prescribed area an income tax concession *in recognition of the disadvantages to which they are subject because of the uncongenial climatic conditions, isolation and high cost of living* in Zone A and, to a lesser extent, in Zone B, in comparison with parts of Australia not included in the prescribed area …[[168]](#footnote-168)

While such legislative objectives statements are only relevant (not conclusive) in determining the objectives of legislation,[[169]](#footnote-169) this particular statement is supported by extrinsic materials and judicial acceptance.

The Explanatory Memorandum to the amending Bill that inserted section 79A elaborated on this objective and, along with the second reading speech, provided an additional one. Both recognised that, while employees in remote areas were often paid special allowances, those allowances were taxable and, due to the prevailing high marginal rates of personal income tax, significant parts of such allowances were absorbed by tax.[[170]](#footnote-170) According to the Memorandum, section 79A would remedy this and thereby fulfil the *dual* objectives of encouraging settlement of remote areas (including post war development) and compensating the residents of such areas for the disabilities of isolation, high costs of living and uncongenial climatic conditions. Seventy years later, this latter objective was again emphasised in the extrinsic materials related to the latest Bill that amended section 79A.[[171]](#footnote-171)

 Moreover, in *Clyne*, Webb J took judicial notice of the disadvantages suffered by remote areas noting that the concessions granted by section 79A

are expressed … to be in recognition of the disadvantages to which those residents are subject because of the ‘uncongenial climatic conditions, isolation and high cost of living’ in those areas in comparison with other parts of Australia, and such disadvantages can, I think, be judicially noticed as existing in those areas.[[172]](#footnote-172)

In light of this effective acceptance of the legislative statement of objectives, the long history of that (unaltered) statement and the consistency between that statement and the objectives expressed in the extrinsic materials, it is reasonable to conclude that the dual objectives of the zone tax offset are encouraging development of remote areas and compensating residents living there.

 Having determined the objectives of the zone tax offset, the next step is to determine whether those objectives are proper, in the sense of being compatible with the objectives of section 51(ii) (namely, protection of the Australian economic union and equality of the states and their peoples). This is difficult because the High Court has rejected the existence of a constitutional doctrine of equality,[[173]](#footnote-173) has ‘fail[ed] to clarify and to develop the concept of an economic union’,[[174]](#footnote-174) and has ‘not developed a coherent theory of federalism, … nor articulated substantial federal principles, or fashioned an interpretative method suited to federalism.’[[175]](#footnote-175) However, this doctrinal void has been addressed to some extent by academic writings. Professor Saunders emphasised that sophisticated understandings of equality include both formal equality of opportunity and substantive equality of outcome.[[176]](#footnote-176) Moreover, Rose argues that the Australian economic union is comprised of a customs union and free trade area.[[177]](#footnote-177) Consequently, the question is whether the objectives of the zone tax offset are compatible with the Australian customs union and free trade area and a sophisticated understanding of equality?

In principle, there is no incompatibility between a customs union and free trade area on the one hand and encouraging the development of remote areas and compensating residents who live there on the other.[[178]](#footnote-178) In a broad sense, all of these objectives encourage economic development by different means. In a more technical sense, the zone tax offset does not affect Australia’s uniform custom duties or restrict freedom of trade in any way. Nor are the objectives of development and compensation inconsistent with the equality of the states and their peoples; indeed, they support and further equality of outcome, which the Privy Council found was a proper objective in *Moran*.[[179]](#footnote-179) Recognising this, Australia has long maintained a system of payments from the Commonwealth government to its state and territory counterparts to alleviate horizontal fiscal inequality between the states and territories.[[180]](#footnote-180)

 Academic commentary supports the conclusion that encouraging development of remote areas and compensating residents living there are proper objectives. Coper has argued that the financial provisions of the *Constitution*, including section 51(ii), attempt to strike a reasonable balance between promoting national economic unity whilst simultaneously permitting localised economic policies, provided they do not compromise that unity.[[181]](#footnote-181)In relation to section 117, which prohibits discrimination on the basis of state residence, Simpson has argued that the High Court ‘should remain focused on safe-guarding the collective, federal-structural interest in national unity.’[[182]](#footnote-182) This approach recognises that in some instances ‘the national interest in properly functioning federalism and adequate government provision can be seen as better served by principles of localism’.[[183]](#footnote-183)

Similarly, Professor Anderson has argued in relation to section 51(ii) that ‘economic and geographical differences between States and regions may necessitate, in the general national interest, discriminatory legislation designed to compensate for them’.[[184]](#footnote-184) Indeed, writing at Federation, Quick and Garran concluded that differential treatment aimed at ‘the development of the territory of a State’ would not be ‘unfederal in character’ and thus would not constitute discrimination.[[185]](#footnote-185) Consequently, the zone tax offset has proper objectives because it is in the national interest to develop remote areas and compensate residents of those areas for the disadvantages they face.

 That conclusion is further supported by the law in other federations. The US Supreme Court in *Ptasynski* upheld special regional taxation measures. In the EU, articles 107 and 349 of the *Treaty on the Functioning of the European Union* go further and expressly authorise state aid measures aimed at encouraging development of particular regions.[[186]](#footnote-186) A similar provision is contained in the *Swiss Constitution*, which provides that the Confederation ‘may support regions of the country that are under economic threat’.[[187]](#footnote-187) This permits the Swiss confederation, cantons and municipalities to set different income and corporation tax rates for different regions.[[188]](#footnote-188)

For all of these reasons, the zone tax offset has proper objectives. Section 79A, the extrinsic materials in relation to it and the limited judicial consideration of it all confirm that it has the dual objectives of encouraging development of remote areas and compensating residents who live there. These objectives are proper for the purposes of section 51(ii) because they are compatible with the Australian economic union and the equality of the states and their peoples.

## D Appropriate and Adapted (Proportionality)

 Unfortunately, *Colonial*, *Moran*, *Permanent Trustee* and *Fortescue* provide no methodology for determining whether provisions of taxation laws are appropriate and adapted to their objective. In both cases, the High Court simply asserted that the relevant provisions were appropriate and adapted. Having said that, French CJ in *Fortescue* suggested that the subsistence of provisions for long periods of time might be an indication that they are appropriate and adapted.[[189]](#footnote-189) Given the 70 year history of the zone tax offset, this might suggest that it is appropriate and adapted to the attainment of its objectives. Nevertheless, longevity alone cannot be the basis for a finding of constitutional validity; there must be substantive concepts that give meaning to the appropriate and adapted criterion.

Further guidance on the content of the appropriate and adapted criterion can only be gained by reference to its use in other constitutional contexts. It is most commonly applied by the High Court when considering the implied freedom of political communication, which, like the section 51(ii) discrimination prohibition, is a limitation on legislative power. In the most recent decision on the freedom, a joint majority of the High Court confirmed that the appropriate and adapted criterion involves a proportionality test focused on the extent of the burden legislation places on the freedom.[[190]](#footnote-190)

This test involves three stages: suitability, necessity and adequate balance.[[191]](#footnote-191) Suitability requires a rational connection between the legislative provisions and their objectives so that the former further the latter.[[192]](#footnote-192) Necessity requires that there be no obvious, compelling and reasonably practicable alternative means of achieving the objective that has a less restrictive effect on the freedom.[[193]](#footnote-193) An adequate balance requires that any positive effects from achieving the legislative objective exceed any negative effects on the freedom, having regard to the importance of the legislative objective and the extent of the effect on the freedom.[[194]](#footnote-194)

Importantly, however, there are fundamental differences between the section 51(ii) discrimination prohibition and the freedom of political communication. Section 51(ii) is an express economic prohibition, whereas the freedom is a human rights protection that is not expressly set out in the *Constitution* but implied from its text and structure. Furthermore, until recently there was significant judicial disagreement regarding the content of the appropriate and adapted criterion. Finally, when applying the freedom, the Court has long endorsed a two-stage defeasibility model of discrimination, whereas French CJ in *Fortescue* emphasised that section 51(ii) embodies a holistic balancing model.

Cognisant of these differences, the three stage proportionality test can be conceptually modified to apply in the section 51(ii) context by replacing the references to ‘the freedom’ with references to ‘the economic union and equality of the states and their peoples section 51(ii) protects’. The operation of the zone tax offset and its legislative history raise a number of issues relevant to this proportionality test: the fact that the offset is non-refundable, non-transferable and unable to be carried forward or backwards; the lack of review or indexation of base offset amounts; the fact that the offset is available only to individual taxpayers; the availability of the offset to non-employees; and, the arbitrary boundaries of the prescribed area and its constituent zones. None, however, are fatal to the constitutional validity of the zone tax offset.

To begin with, the fact that the offset is non-refundable, non-transferable and unable to be carried forward or backwards to other income years raises suitability issues. If the objectives of the offset are to encourage development and compensate residents of remote areas, its value should be available to all residents. Despite this, the limited nature of the offset means that taxpayers cannot obtain its benefit if they are in an overall loss position or otherwise have no income tax liability. Juxtapose the result if the offset were instead a deduction: it would increase the deductible losses of the taxpayer that could be carried forward into future years.

Another feature of the zone tax offset that raises suitability issues is that, because the base offset amounts have always been specified in section 79A, any increase to them has required primary legislation. Since 1945, the amounts have been sporadically increased (only six times in total) due to ‘a pronounced reluctance to index … for inflation.’[[195]](#footnote-195) The Zone Allowances Inquiry noted that the ‘amounts of the basic allowance have remained largely unchanged since 1958’ and, one member of the Inquiry, in an additional personal statement, opined that they had ‘been seriously eroded by inflation to the point where currently they are almost inconsequential.’[[196]](#footnote-196) As a remedy, the Zone Allowances Inquiry recommended that the quantum of the amounts be reviewed every five years.[[197]](#footnote-197) This was not implemented. Currently, the quantum of the offset is neither automatically reviewed nor indexed. As the amounts were last increased in 1992, the value of the offset has ‘been significantly eroded by inflation.’[[198]](#footnote-198)

Both of these arguments collapse into a complaint that the offset is not as effective as it could be. However, that does not mean it is not suitable (that is, able to further its objectives). The offset clearly furthers and has a rational connection with its objectives by providing monetary inducement/compensation to remote residents, but limits the quantum of that inducement/compensation. Nothing in the suitability test mandates that provisions perfectly and consistently achieve their objectives to the same extent every year. Indeed, such an extreme requirement might necessarily mean that the provision implementing it would not pass the necessity and adequate balance tests. In relation to the advantages that residents could gain if the offset was instead a deduction, the High Court in *Fortescue* unanimously held that the fact that the challenged provisions operated as an offset rather than a deduction was irrelevant.[[199]](#footnote-199)

A more problematic suitability issue is whether the zone tax offset does in fact encourage regional development. On this point, the limited commentary is equivocal. The Zone Allowances Inquiry ‘noted that, while the effects of zone allowances on development may have been of significance at the time of their introduction in 1945, they could only be described as minimal today.’[[200]](#footnote-200) It thought that the offset was ‘a poor vehicle to dispense any decentralisation’ because it ‘dissipates resources thinly and unselectively’.[[201]](#footnote-201) In contrast, Manning argued that the offset does encourage development primarily by assisting in the provision of remote infrastructure and reducing high levels of uninsurable risks in remote export industries.[[202]](#footnote-202) Again, this is a dispute over economic efficiency, which is a matter for economists and irrelevant for the reasons just given.

What is relevant is that the offset has always been restricted to individual residents and unavailable to companies or trustees. Surely if the offset is intended to encourage regional development, it should be available to all legal persons who derive income from regional areas. Alternatively, its restriction to individuals may simply reflect arguments that corporate residence is easy to relocate without relocating substantive business activities or that allowing companies and trustees to access the offset could effectively give the beneficial owners of those companies and trusts a double offset.[[203]](#footnote-203) Ultimately, the issue is moot because the offset has dual objectives and if it is unsuitable to encourage development, its objective of compensating residents remains. Failure of the development objective may, nonetheless, narrow the ability for the offset provisions to satisfy the necessity and adequate balance tests.

Moving away from suitability issues, the fact that the offset is available to non-employees raises issues of necessity and balancing. When section 79A was originally enacted, the Treasurer emphasised that it was designed to ensure that employees *paid special allowances* did not lose the value of those allowances due to the prevailing high marginal tax rates.[[204]](#footnote-204) Yet despite this, the offset is available to all residents of the prescribed area and is not restricted to resident employees, let alone those in receipt of special allowances.[[205]](#footnote-205) As such, it could be argued that it bestows benefits too widely. However, any such argument would be misconceived because it identifies the objective of the offset unnecessarily narrowly.

The Treasurer’s statements in 1945 were made in a unique historical context. Employment arrangements and the precise details of remuneration change significantly over time. In the modern economy, people have multiple ways of deriving income other than employment. This is confirmed by the explanatory materials to the latest amendments to section 79A,[[206]](#footnote-206) which excluded fly-in fly-out (FIFO) workers from claiming the offset because the ‘original intent’ of the zone tax offset was ‘to compensate Australians *genuinely living* in these regional areas for certain disadvantages associated with living in such remote areas.’[[207]](#footnote-207) Indeed, those materials asserted it would be inappropriate for persons already well compensated by their employers for adversities associated with working in remote areas to be entitled to the offset.[[208]](#footnote-208) Consequently, when the broad objective of the offset is understood as compensating people living in remote areas, the fact it is not restricted to employees does not mean that it goes beyond what is necessary or that it has an overall negative effect.

Similar necessity and balancing issues are raised by the boundaries of Zones A and B and the special area. Whether the offset’s boundaries ever reflected relatively homogenous areas of remoteness is unclear. In giving the second reading speech for the amending Bill that inserted section 79A, the Treasurer stated:

In prescribing the areas of the respective zones, the factors taken into consideration in determining ‘climatic conditions, isolation and high cost of living’ were rainfall, latitude, distance from centres of population, density of population, predominant industries, rail and road service, and cost of food and groceries. These factors gave a general picture of the areas in respect of which the allowance should be granted.[[209]](#footnote-209)

Neither the speech nor the Explanatory Memorandum gave any further detail. The Zone Allowances Inquiry concluded that it was impossible ‘to ascertain how data relevant to the various factors were assembled and from what sources, or how they were collated and weighed for the determination of the 1945 zone boundaries.’[[210]](#footnote-210) Put simply, ‘[u]nfortunately, the exact criteria used in the demarcation (if there were any) have been lost.’[[211]](#footnote-211)

 What is clear is that the boundaries have not kept pace with the development of Australia. Any changes to the boundaries require primary legislation. Despite the passage of 70 years, changes to the boundaries have been irregular and minor. The only major changes occurred in 1956 and 1982.[[212]](#footnote-212) No reason was given for the 1956 change, while the 1982 change introduced the ‘special area’ in response to the recommendations of the Zone Allowances Inquiry to provide greater assistance to residents of ‘particularly isolated areas’.[[213]](#footnote-213) The most recent (albeit minor) amendment of the boundaries of the prescribed area occurred in 1990.

Given this lack of change, there has been consistent criticism of the contemporary relevance of the boundaries of the prescribed area. The Zone Allowances Inquiry noted the ‘wide variation in conditions within the present zones’ produced a ‘rather arbitrary two zones system’ and recommended that towns with populations of 25,000 or greater in Zone A be reclassified to Zone B and those in Zone B be reclassified to outside the prescribed area as well as conducting quinquennial reviews of the boundaries. Nineteen years later, the comprehensive Henry Tax Review reached similar conclusions:

it is notable that the zones do not appear to be determined by any modern concept of remoteness. The zones were established in 1945 and the boundaries have remained broadly unchanged since 1956. Given changes in population and the distribution of industry and transport infrastructure since 1956, many areas in the zones are not disadvantaged or isolated. On the other hand some remote areas fall outside the zones. ... The zone tax offset should be reviewed, with a view to providing assistance based on contemporary measures of remoteness.[[214]](#footnote-214)

Likewise, Manning concluded ‘[t]here is a strong case for redefining the zones’.[[215]](#footnote-215) Most recently, the Commonwealth government’s white paper on northern Australia concluded that the offset ‘is out of date and poorly targeted’ and reaffirmed the government’s intention to exclude FIFO workers from eligibility.[[216]](#footnote-216) The more arbitrary the zone boundaries, the less likely they are to satisfy the requirements of necessity and adequate balance.[[217]](#footnote-217) This is because arbitrary boundaries create a greater restrictive and negative effect on the Australian economic union and equality of the states and their peoples that is not matched by correlative positive effects in the form of development and compensation in true remote areas.

However, not all of the offset’s boundaries are absolute and inflexible. Section 79A(3E) grants the Commissioner of Taxation the power to deem parts of Zone A or B to form part of the special area ‘if he or she considers it appropriate having regard to all the circumstances’.[[218]](#footnote-218) Moreover, the criticisms of the zone boundaries focus on the extent to which they recognise *appropriate degrees of remoteness*; each implicitly recognises that, at a high level, the zone boundaries generally reflect concepts of remoteness. For instance, no state capital city falls within the prescribed area. Furthermore, the Zone Allowances Inquiry conceded that ‘difficulties remain in determining the boundaries of [remote] areas and in establishing the extent to which there are degrees of remoteness’.[[219]](#footnote-219)

Ultimately, these issues of degree do not preclude the conclusion that the zone tax offset satisfies the necessity and adequate balance tests. In terms of necessity, there is no other equally effective way of encouraging remote development and compensating remote residents without making payments to people. Regardless of whether those payments are made through the taxation system in the form of the offset, under social security legislation in the form of benefits, [[220]](#footnote-220) or through tied grants to the states,[[221]](#footnote-221) the economic effect on the economic union and equality of the states and their peoples is the same. That being so, the offset falls ‘within the domain of selections that fulfil the legislative purpose with the least harm to the [economic union and equality, so that] the decision to select the preferred means is the legislature’s.’[[222]](#footnote-222)

In terms of adequate balance, given that less than 600,000 taxpayers are eligible for the offset and its annual cost is less than $0.3 billion, the extent of any negative market distortions upon the economic union should be minimal. Furthermore, payment of the offset actually promotes the equality of states and their peoples in terms of outcome. In these circumstances, the positive impact that the offset has by encouraging development and compensating residents of remote areas exceeds any negative effects it has on the Australian economic union and the equality of the states and their peoples. This conclusion is also consistent with the reasoning in *Colonial* and *Moran*. For all of these reasons, the zone tax offset is appropriate and adapted to the attainment of its objectives.

## E Conclusion

 Accordingly, the zone tax offset does not discriminate between states or parts of states. It imposes no differential treatment on the basis of state connection between persons in the same circumstances. Furthermore, the distinction that it makes between remote and non-remote residents is appropriate and adapted to the attainment of two proper objectives: encouraging development of remote areas and compensating the people who live there.

# VIII Conclusion

 In an effort to add to the sparse commentary on both the prohibition on taxes that discriminate between states or parts of states contained in section 51(ii) of the *Constitution* and the zone tax offset contained in section 79A of the *ITAA 1936*, I have sought here to critically analyse whether the offset breaches the prohibition. The explanatory materials to the *Constitution*, the jurisprudence on provisions of the *Constitution* related to section 51(ii), the jurisprudence on section 51(ii) itself and the jurisprudence of the US Supreme Court regarding the equivalent prohibition in the *United States Constitution* all support the conclusion that the section 51(ii) discrimination prohibition is more sophisticated and nuanced than a mere requirement that taxation laws have uniform terms. Section 51(ii) prohibits differential treatment of persons imposed on the basis of state connection regardless of any other circumstances, that is not appropriate and adapted to proper objectives. Accordingly, the interpretative approach adopted by French CJ in *Fortescue* is not the offset’s only constitutional lifeline, although it is the clearest exposition of the proper interpretation of section 51(ii).

Applying that interpretation to the zone tax offset, the result is that section 51(ii) is not breached. The zone tax offset does not treat people *in the same circumstances* differently due to their state connection; rather, all individual residents of Australia are treated in a similar way depending on the extent of the socio-economic impact of the remoteness of their residence. The zone tax offset distinguishes between remote and non-remote residents in the furtherance of dual objectives: encouraging the economic development of remote areas and compensating the people who live there for the disadvantages of uncongenial climatic conditions, isolation and high cost of living. Those objectives are proper because they are consistent and compatible with the purposes of the section 51(ii) discrimination prohibition: protection of the Australian economic union, consisting of a customs union and free trade area, and the equality of the states and their peoples. Finally, the zone tax offset is appropriate and adapted to achieving these objectives because it provides monetary inducement/compensation in furtherance of those objectives, there is no reasonably practicable alternative means of achieving those objectives and on balance the offset has a positive impact on the Australian economy.

A holistic balancing of all of these factors necessitates the conclusion that the zone tax offset complies with the prohibition in section 51(ii) of the *Constitution* on taxes that discriminate between states or parts of states.

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*Income Tax Assessment Amendment Act 1982* (Cth)

*Judiciary Act 1903* (Cth)

*Tax and Superannuation Laws Amendment (2015 Measures No. 5) Act 2015* (Cth)

F *Treaties*

*Treaty on the Functioning of the European Union*, opened for signature 25 March 1957, [2012] OJ C 326/47 (entered into force 1 January 1958)

G *Constitutional Convention and Parliamentary Debates*

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Commonwealth, *Parliamentary Debates,* House of Representatives, 24 March 1982

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*Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891

*Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897

*Official Record of the Debates of the Australasian Federal Convention*, Sydney, 22 September 1897

*Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898

H *Explanatory Memoranda*

Explanatory Memorandum, Income Tax Assessment Amendment Bill 1982 (Cth)

Explanatory Memorandum, Income Tax Assessment Bill 1945 (Cth)

Explanatory Memorandum, Tax and Superannuation Laws Amendment (2015 Measures No 5) Bill 2015 (Cth)

I *Other*

Australian Taxation Office, *The Australian Zone List,* PSLA 2002/6, 4 February 2002

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Australian Taxation Office, *Manual for the National Tax Equivalent Regime* (9th ed, April 2014)

Australian Taxation Office, *Taxation statistics 2012–13, Table 1: Individuals: Selected items, for income years 1978–79 to 2012–13* (4 May 2015) <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-statistics/Taxation-statistics-2012-13/?page=22>

European Commission, *Guidelines on Regional State Aid for 2014-2020* [2013] OJ C 209/01

European Commission, *The European Union Explained: Taxation* (2015)

Federal Department of Finance (Switzerland), *Federal, Cantonal and Communal Taxes* (2016) <https://www.estv.admin.ch/estv/en/home/allgemein/dokumentation/
publikationen/weitere-publikationen/kurzabriss-ueber-das-schweizerische-steuersystem.html >

1. *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9, *Constitution*, s 51(ii) (‘*Constitution*’). [↑](#footnote-ref-1)
2. *Income Tax Assessment Act 1945* (Cth) ss 11, 19. [↑](#footnote-ref-2)
3. *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 594 (‘*Fortescue*’). [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. Amelia Simpson, ‘Fortescue Metals Group Ltd v Commonwealth: Discrimination and Fiscal Federalism’ (2014) 25 *Public Law Review* 93, 94. [↑](#footnote-ref-5)
6. *Fortescue* (2013) 250 CLR 548, 585. [↑](#footnote-ref-6)
7. *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 6. [↑](#footnote-ref-7)
8. Ross Anderson, ‘The States and Relations With The Commonwealth’ in Justice Else-Mitchell, *Essays on the Australian Constitution* (Law Book, 2nd ed, 1961) 93, 94-5; Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 18-19; Dennis Rose, ‘Discrimination, Uniformity and Preference – Some Aspects of the Express Constitutional Provisions’ in Leslie Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 191, 191-3; P H Lane, *The Australian Federal System* (Law Book, 2nd ed, 1979) 114; Cheryl Saunders, ‘Concepts of Equality in the Australian Constitution’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 209, 209-11. [↑](#footnote-ref-8)
9. *Constitution* s 102. [↑](#footnote-ref-9)
10. Ibidss 88, 90. [↑](#footnote-ref-10)
11. Ibids 51(iii). [↑](#footnote-ref-11)
12. Ibid s 92. [↑](#footnote-ref-12)
13. Ibid s 117. [↑](#footnote-ref-13)
14. Saunders, above n 8, 211. See also Dennis Rose, ‘Discrimination and Preference’ in Graham Brennan (ed), *Constitutional Reform and Fiscal Federalism* (Centre for Research on Federal Financial Relations, ANU Occasional Paper No 42, 1987) 61, 67. [↑](#footnote-ref-14)
15. *Income Tax Assessment Act 1997* (Cth) ss 4-10, 4-15 (‘*ITAA 1997*’). [↑](#footnote-ref-15)
16. Ibid s 13-1. [↑](#footnote-ref-16)
17. Australian Taxation Office, *Taxation statistics 2012–13, Table 1: Individuals: Selected items, for income years 1978–79 to 2012–13* (4 May 2015) <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-statistics/Taxation-statistics-2012-13/?page=22>. [↑](#footnote-ref-17)
18. *ITAA 1936* s 79A(1). [↑](#footnote-ref-18)
19. Ibid s 79A(3B). [↑](#footnote-ref-19)
20. Ibid s 79A(4). For the zones as enacted, see Figure 1. For the current zones, see Figure 2. [↑](#footnote-ref-20)
21. Ibid sch 2 pt I. [↑](#footnote-ref-21)
22. Ibid sch 2 pt II. [↑](#footnote-ref-22)
23. Ibid s 79A(3D), 79A(4). Individuals who were eligible before 1981 based on 1976 census data may still rely on the 1976 data. [↑](#footnote-ref-23)
24. Explanatory Memorandum, Income Tax Assessment Bill 1945 (Cth). [↑](#footnote-ref-24)
25. *ITAA 1936* ss 79A(2)-79A(2A), 79A(4); *ITAA 1997* sub-divs 61-A, 961-A, 961-B. [↑](#footnote-ref-25)
26. Commonwealth, *Report of the Public Inquiry into Income Tax Zone Allowances,* Parl Paper No 149 (1981) 3 (‘Zone Allowances Inquiry’). [↑](#footnote-ref-26)
27. *ITAA 1997* ss 63-10(1) item 20, 67-20, 67-23. [↑](#footnote-ref-27)
28. Commonwealth, *Parliamentary Debates,* House of Representatives, 19 April 1945, 924 (Joseph Chifley, Treasurer). [↑](#footnote-ref-28)
29. Geoffrey Sawer, ‘Commonwealth Taxation Laws – Uniformity and Preference’ (1958) 32 *Australian Law Journal* 132. [↑](#footnote-ref-29)
30. (1958) 100 CLR 246, 259 (‘*Clyne*’). [↑](#footnote-ref-30)
31. Ibid 265-8 (Dixon CJ), 268 (McTiernan and Williams JJ), 272 (Kitto and Taylor JJ). [↑](#footnote-ref-31)
32. Ibid 271-2. [↑](#footnote-ref-32)
33. Rose, above n 8, 197-8; Rose, above n 14, 70-1; Lane, above n 8, 114; Anthony Gray, ‘Discriminatory Taxation in Light of *Fortescue*: Its Implications for the Development of Northern Australia’ (2014) 42 *Federal Law Review* 67, 79. [↑](#footnote-ref-33)
34. Sawer, above n 29; Gareth Evans, ‘The Most Dangerous Branch? The High Court and the Constitution in a Changing Society’ in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (Law Book, 1976) 13, 33. [↑](#footnote-ref-34)
35. Zone Allowances Inquiry, above n 25, 5. [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Sawer, above n 8, 147. [↑](#footnote-ref-37)
38. Rose, above n 14, 77; cf *Clyne* (1958) 100 CLR 246, 259. [↑](#footnote-ref-38)
39. Rose, above n 14, 77. [↑](#footnote-ref-39)
40. *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 679, 701; *Official Report of the National Australasian Convention Debates*, Adelaide, 17 April 1897, 767; *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 22 September 1897,1068. [↑](#footnote-ref-40)
41. 157 US 429, 595-6 (1895). [↑](#footnote-ref-41)
42. *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2397 (emphasis added). [↑](#footnote-ref-42)
43. Subsequently, additional words were removed by unreported verbal amendments to leave the prohibition as it currently stands: John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 549. [↑](#footnote-ref-43)
44. W Harrison Moore, *The Constitution of The Commonwealth of Australia* (Charles Maxwell, 2nd ed, 1910) 516. [↑](#footnote-ref-44)
45. Saunders, above n 8, 221. [↑](#footnote-ref-45)
46. See also Quick and Garran, above n 43, 550, 877, 914. [↑](#footnote-ref-46)
47. See, eg, Moore, above n 44, 516. [↑](#footnote-ref-47)
48. (1936) 54 CLR 657, 668 (Latham CJ), 683 (Dixon J) (‘*Elliott*’). [↑](#footnote-ref-48)
49. Sawer, above n 8, 148. [↑](#footnote-ref-49)
50. Taxation laws are laws of revenue: *Elliott* (1936) 54 CLR 657, 668 (Latham CJ); *Clyne* (1958) 100 CLR 246, 268 (Dixon CJ). [↑](#footnote-ref-50)
51. *Colonial Sugar Refining Co Ltd v Irving* [1903] St R Q 261, 275-7 (Griffith CJ, Cooper J), 281 (Real J), [1906] AC 360, 364, 367-8; *R v Barger* (1908) 6 CLR 41, 78, 80 (Griffith CJ, Barton and O’Connor JJ), 107 (Isaacs J); *Cameron v Deputy Federal Commissioner of Taxation (Tas)* (1923) 32 CLR 68, 71 (Knox CJ), 79 (Rich and Starke JJ). [↑](#footnote-ref-51)
52. (1936) 54 CLR 657, 670. [↑](#footnote-ref-52)
53. Ibid 683. [↑](#footnote-ref-53)
54. Quick and Garran, above n 43, 877. [↑](#footnote-ref-54)
55. Ibid 878 (emphasis added). [↑](#footnote-ref-55)
56. *Cole v Whitfield* (1988) 165 CLR 360, 395. [↑](#footnote-ref-56)
57. Ibid 399. [↑](#footnote-ref-57)
58. *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472, 477 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 476-8 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan, Kiefel JJ). [↑](#footnote-ref-58)
59. (1989) 168 CLR 461, 491-3 (Mason CJ), 511 (Brennan J), 528 (Deane J), 548 (Dawson J), 560 (Toohey J), 570-1 (Gaudron J), 582-4 (McHugh J). [↑](#footnote-ref-59)
60. (2004) 220 CLR 388, 425 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) (‘*Permanent Trustee*’). [↑](#footnote-ref-60)
61. Amelia Simpson, ‘The High Court’s Conception of Discrimination: Origins, Applications, and Implications’ (2007) 29 *Sydney Law Review* 263, 264. See also Sawer, above n 8, 147. [↑](#footnote-ref-61)
62. Saunders, above n 8, 215. [↑](#footnote-ref-62)
63. Melissa Castan and Sarah Joseph, *Federal Constitutional Law* (Lawbook, 2001) 370. [↑](#footnote-ref-63)
64. Saunders, above n 8, 211. [↑](#footnote-ref-64)
65. Gray, above n 33, 68. [↑](#footnote-ref-65)
66. (2013) 250 CLR 548, 594 (Hayne, Bell and Keane JJ). [↑](#footnote-ref-66)
67. Ibid 567 (French CJ). See also C I Menhennitt, ‘Freedom and Preference in Inter-State Trade’ in Justice Else-Mitchell, *Essays on the Australian Constitution* (Law Book, 2nd ed, 1961) 275, 290. [↑](#footnote-ref-67)
68. Simpson, above n 5, 95. [↑](#footnote-ref-68)
69. (1908) 6 CLR 41, 78-80 (‘*Barger*’). [↑](#footnote-ref-69)
70. Ibid 108. [↑](#footnote-ref-70)
71. Ibid. [↑](#footnote-ref-71)
72. Ibid 110 (emphasis added). [↑](#footnote-ref-72)
73. Ibid 130-3. [↑](#footnote-ref-73)
74. Ibid 78. [↑](#footnote-ref-74)
75. *Fortescue* (2013) 250 CLR 548, 633 (Kiefel J). See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. [↑](#footnote-ref-75)
76. Ibid 579 (French CJ); cf 595-6 (Hayne, Bell and Keane JJ), 633 (Kiefel J). [↑](#footnote-ref-76)
77. (1908) 6 CLR 41, 80 (emphasis added). [↑](#footnote-ref-77)
78. *Deputy Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735, 758 (Latham CJ). [↑](#footnote-ref-78)
79. Sawer, above n 8, 149. [↑](#footnote-ref-79)
80. *Fortescue* (2013) 250 CLR 548, 595-6, 633. These decisions are considered below. [↑](#footnote-ref-80)
81. Sawer, above n 29. [↑](#footnote-ref-81)
82. Rose, above n 14, 68. [↑](#footnote-ref-82)
83. Sawer, above n 8, 147; cf, W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 4th ed, 1970) 182. [↑](#footnote-ref-83)
84. (1958) 100 CLR 246, 266. [↑](#footnote-ref-84)
85. Anderson, above n 8, 107. [↑](#footnote-ref-85)
86. Sawer, above n 8, 147-8; Anderson, above n 8, 107; Castan and Joseph, above n 63, 368. [↑](#footnote-ref-86)
87. (1923) 32 CLR 68, 72 (Knox CJ), 75-7 (Isaacs J), 78-9 (Higgins J), 79 (Rich J), 79-80 (Starke J) (‘*Cameron*’). Given its unique facts, *Cameron* provides ‘an unusually clear example of s 51(ii) discrimination’: *Fortescue* (2013) 250 CLR 548, 632 (Kiefel J). [↑](#footnote-ref-87)
88. Amelia Simpson, ‘The (Limited) Significance of the Individual in Section 117 State Residence Discrimination’ (2008) 32 *Melbourne University Law Review* 639, 656. [↑](#footnote-ref-88)
89. See *Judiciary Act 1903* (Cth) s 23(2)(b). [↑](#footnote-ref-89)
90. (1968) 118 CLR 90, 95-6 (Barwick CJ), 96 (McTiernan J), 103 (Menzies J) (emphasis added) (‘*Conroy*’). [↑](#footnote-ref-90)
91. (2013) 250 CLR 548, 635. [↑](#footnote-ref-91)
92. (1968) 118 CLR 90, 95-6 (Barwick CJ), 96 (McTiernan and Kitto JJ), 101-2 (Taylor J), 103 (Menzies J), 104 (Windeyer J). [↑](#footnote-ref-92)
93. Ibid 103-4. [↑](#footnote-ref-93)
94. Ibid 101-2. [↑](#footnote-ref-94)
95. Rose, above n 14, 77. [↑](#footnote-ref-95)
96. Castan and Joseph, above n 63, 370. [↑](#footnote-ref-96)
97. Saunders, above n 8, 217. [↑](#footnote-ref-97)
98. Soon after the excise Tariff was passed, the Parliament also passed a customs Tariff, which imposed uniform duties of customs to satisfy s 88 of the *Constitution*. Both Tariffs were retrospectively deemed to commence on 8 October 1901, at which point state customs and excise duties legislation ceased to have effect pursuant to s 90 of the *Constitution*. Accordingly, the exemption only operated for the transitional/retrospective period. [↑](#footnote-ref-98)
99. [1903] St R Qd 261, 276-277 (Griffith CJ), 277 (Cooper J), 281 (Real J) (‘*Colonial*’). [↑](#footnote-ref-99)
100. Ibid 276. [↑](#footnote-ref-100)
101. [1906] AC 360, 367-8 (emphasis added). [↑](#footnote-ref-101)
102. (1939) 61 CLR 735, 754-8 (Latham CJ), 767 (Rich J), 775 (Starke J), 809 (McTiernan J) (‘*Moran*’). [↑](#footnote-ref-102)
103. (1908) 6 CLR 41, 69-71 (Griffith CJ, Barton and O’Connor JJ); (1923) 32 CLR 68, 76-7 (Isaacs J). [↑](#footnote-ref-103)
104. (1939) 61 CLR 735, 760. [↑](#footnote-ref-104)
105. Ibid 778. [↑](#footnote-ref-105)
106. Rose, above n 14, 73. See also Wynes, above n 83, 184. [↑](#footnote-ref-106)
107. [1940] AC 838, 849. [↑](#footnote-ref-107)
108. Ibid 858-9 (emphasis added). [↑](#footnote-ref-108)
109. (2013) 250 CLR 548, 602-603 (Hayne, Bell and Keane JJ), 619 (Crennan J), 635-6 (Kiefel J). [↑](#footnote-ref-109)
110. Ibid 604 (emphasis added). [↑](#footnote-ref-110)
111. See Part IV. [↑](#footnote-ref-111)
112. Simpson, above n 5, 95-6. [↑](#footnote-ref-112)
113. See also (2013) 250 CLR 548, 603-4. [↑](#footnote-ref-113)
114. *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 676-7. See also Anderson, above n 8, 107. [↑](#footnote-ref-114)
115. Quick and Garran, above n 43, 549. [↑](#footnote-ref-115)
116. (1992) 174 CLR 455, 485. [↑](#footnote-ref-116)
117. (2013) 250 CLR 548, 585 (emphasis added). [↑](#footnote-ref-117)
118. Ibid 619 (emphasis added). [↑](#footnote-ref-118)
119. *Income Tax Assessment Act 1997* (Cth) s 9-1. Notional income tax is imposed on specified state instrumentalities, but only pursuant to the National Tax Equivalent Regime agreement between the Commonwealth and the states: Australian Taxation Office, *Manual for the National Tax Equivalent Regime* (9th ed, April 2014) [6], [13]. [↑](#footnote-ref-119)
120. The states did invoke the section 51(ii) discrimination prohibition when they challenged the wartime uniform income tax legislation on various grounds, but that challenge was unsuccessful and the High Court gave the section 51(ii) arguments short shrift: *South Australia v Commonwealth* (1942) 65 CLR 373, 427-9 (Latham CJ), 436 (Rich J), 448 (Starke J), 456 (McTiernan J), 471-2 (Williams J). [↑](#footnote-ref-120)
121. (2013) 250 CLR 548, 563 (emphasis added). [↑](#footnote-ref-121)
122. Martin Clark, ‘Royalties, Discrimination and Federalism: Fortescue Metals Group Ltd v Commonwealth’ (2013) 28(10) *Australian Environmental Review* 794, 796. See also Nicholas Helm, ‘Constitutional Law: The Validity of the Mineral Resources Rent Tax’ (2013) 87 *Australian Law Journal* 748. [↑](#footnote-ref-122)
123. Robert Schütze, *European Constitutional Law* (Cambridge University Press, 2012) 79. The precise constitutional nature of the EU remains debated: 47-79. For present purposes, it is sufficient to consider the EU as a *de facto* federation or equivalent. [↑](#footnote-ref-123)
124. European Commission, *The European Union Explained: Taxation* (2015) 4. Even if the proposed EU Financial Transaction Tax goes ahead, it will be imposed by legislation of the implementing member states. [↑](#footnote-ref-124)
125. *Treaty on the Functioning of the European Union*, opened for signature 25 March 1957, [2012] OJ C 326/47 (entered into force 1 January 1958) arts 45, 49, 56, 63, 107 (‘*FEU*’). [↑](#footnote-ref-125)
126. (1939) 61 CLR 735, 758. [↑](#footnote-ref-126)
127. *FEU* arts 49, 56, 63, 107. [↑](#footnote-ref-127)
128. Ibid arts 45(3), 52(1), 65(2), 65(4), 65(1)(a). [↑](#footnote-ref-128)
129. Ibid arts 107(3)(a), 349. [↑](#footnote-ref-129)
130. *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, ss 91(3), 92(2), 92A(4) (‘*Constitution Act 1867*’), which set out the taxation powers of the federal Parliament and provincial Legislatures. [↑](#footnote-ref-130)
131. Quick and Garran, above n 43, 552, 554. [↑](#footnote-ref-131)
132. See Part III; Quick and Garran, above n 43, 549-50; John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 55. [↑](#footnote-ref-132)
133. Quick and Garran, above n 43, 550. [↑](#footnote-ref-133)
134. Kathleen Morris and Chief Justice James Allsop, ‘The United States and the Australian Constitution: Influence of US constitutional model on development and interpretation of the Australian Constitution’ (2015) 89 *Australian Law Journal* 309, 324. [↑](#footnote-ref-134)
135. *Deputy Commissioner of Taxation (NSW) v Brown* (1958) 100 CLR 32, 39. [↑](#footnote-ref-135)
136. (2013) 250 CLR 548, 601. [↑](#footnote-ref-136)
137. See, eg, Saunders, above n 8, 216-8. [↑](#footnote-ref-137)
138. Morris and Allsop, above n 134, 322, 329-30. [↑](#footnote-ref-138)
139. Simpson, above n 88, 669-70; Stephen McLeish, ‘Federal Implications under the Australian Constitution’ (2014) 25 *Public Law Review* 172, 183. [↑](#footnote-ref-139)
140. (2013) 250 CLR 548, 574, 619-20. [↑](#footnote-ref-140)
141. 462 US 74, 82-84 (1983). [↑](#footnote-ref-141)
142. Ibid 84-5 (emphasis added). [↑](#footnote-ref-142)
143. Ibid 85-6 (emphasis added). [↑](#footnote-ref-143)
144. *Fortescue* (2013) 250 CLR 548, 563 (French CJ). While it is beyond the scope of this article, there is debate about whether courts should employ proportionality analysis in a tax context: see, eg, Vicki Jackson, ‘Constitutional Law in an Age of Proportionality’ (2015) 124 *Yale Law Journal* 3094, 3109-10. For opinions regarding s 51(ii) in particular, see: Saunders, above n 8, 222-3; Evans, above n 34, 66; cf James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6th ed, 2015) 46. [↑](#footnote-ref-144)
145. Ibid 576 (French CJ). [↑](#footnote-ref-145)
146. Simpson, above n 61, 267, 281. [↑](#footnote-ref-146)
147. (2013) 250 CLR 548, 618, quoting *Moran* [1940] AC 838, 854. See also the plurality: 605. [↑](#footnote-ref-147)
148. Ibid 563 (emphasis added). [↑](#footnote-ref-148)
149. Simpson, above n 61, 264. [↑](#footnote-ref-149)
150. Ibid 277. [↑](#footnote-ref-150)
151. *Austin v Commonwealth* (2003) 215 CLR 185, 247 (Gaudron, Gummow and Hayne JJ); *Permanent Trustee* (2004) 220 CLR 388, 424 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). [↑](#footnote-ref-151)
152. *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 630 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). [↑](#footnote-ref-152)
153. Simpson reached a similar conclusion in relation to s 117: above n 88, 663-4. [↑](#footnote-ref-153)
154. Simpson, above n 61, 278. [↑](#footnote-ref-154)
155. See, eg, *ITAA 1997* div 392, which allows individuals carrying on primary production businesses to pay income tax based on their average taxable income over the preceding five years. [↑](#footnote-ref-155)
156. See Part V(C). [↑](#footnote-ref-156)
157. *McCloy v New South Wales* (2015) 89 ALJR 857, 873 (French CJ, Kiefel, Bell and Keane JJ) (‘*McCloy*’). [↑](#footnote-ref-157)
158. (2013) 250 CLR 548, 561-2. [↑](#footnote-ref-158)
159. Ibid 572. [↑](#footnote-ref-159)
160. Ibid 561, 585-6. [↑](#footnote-ref-160)
161. Clark, above n 122, 796. [↑](#footnote-ref-161)
162. (2013) 250 CLR 548, 624. [↑](#footnote-ref-162)
163. The CJEU has recognised various proper objectives in the context of taxation discrimination, including maintaining a balanced allocation of taxing rights between states, preventing double non-taxation and preventing tax avoidance: see, eg, *Marks & Spencer plc v Halsey* (C-446/03) [2005] ECR I-10866, I-10880-3. Given the fundamental constitutional differences between the EU and Australia, this jurisprudence is irrelevant for present purposes: see Part VI(B). [↑](#footnote-ref-163)
164. See Part V(C). [↑](#footnote-ref-164)
165. Ibid. [↑](#footnote-ref-165)
166. The mirror tax legislation scheme was enacted by the Commonwealth and the states in response to the High Court’s decision that state taxation laws did not apply to Commonwealth places because the Commonwealth Parliament has exclusive legislative power in relation to Commonwealth places under s 52(i) of the *Constitution*: *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630. [↑](#footnote-ref-166)
167. (2004) 220 CLR 388, 424-5 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). [↑](#footnote-ref-167)
168. *ITAA 1936* s 79A(1) (emphasis added). [↑](#footnote-ref-168)
169. *South Australia v Commonwealth* (1942) 65 CLR 373, 432 (Latham CJ), 436 (Rich J), 453 (McTiernan J); *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37, 69-70 (Latham CJ). [↑](#footnote-ref-169)
170. Explanatory Memorandum, Income Tax Assessment Bill 1945 (Cth) 20; Commonwealth, *Parliamentary Debates,* House of Representatives, 19 April 1945, 924 (Joseph Chifley, Treasurer). [↑](#footnote-ref-170)
171. Explanatory Memorandum, Tax and Superannuation Laws Amendment (2015 Measures No 5) Bill 2015 (Cth) 18; Commonwealth, *Parliamentary Debates*, House of Representatives, 15 October 2015, 11308 (Kelly O’Dwyer, Assistant Treasurer). [↑](#footnote-ref-171)
172. (1958) 100 CLR 246, 269. [↑](#footnote-ref-172)
173. *Kruger v Commonwealth* (1997) 190 CLR 1. [↑](#footnote-ref-173)
174. Cheryl Saunders, ‘Fiscal Federalism – A General and Unholy Scramble’ in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 101, 125-6. [↑](#footnote-ref-174)
175. Brian Galligan, ‘Fiscal federalism: then and now’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism* (Cambridge University Press, 2012) 320, 328. See also McLeish, above n 139, 184. [↑](#footnote-ref-175)
176. Saunders, above n 8, 212. [↑](#footnote-ref-176)
177. Rose, above n 14, 63. [↑](#footnote-ref-177)
178. See, eg, *FEU* art 176; Sascha Sardadvar, *Economic Growth in the Regions of Europe* (Physica-Verlag, 2011) 1-3. [↑](#footnote-ref-178)
179. [1940] AC 838, 859. See also Latham CJ: ‘[a] wise differentiation based upon relevant circumstances is a necessary element in national policy’: (1939) 61 CLR 735, 764. [↑](#footnote-ref-179)
180. Saunders, above n 174, 113-6. [↑](#footnote-ref-180)
181. Michael Coper, ‘The Economic Framework of the Australian Federation: A Question of Balance’ in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 131, 131-2, 142-3, 148-9. [↑](#footnote-ref-181)
182. Simpson, above n 88, 663. In relation to s 51(ii), see Castan and Joseph, above n 63, 372. [↑](#footnote-ref-182)
183. Simpson, above n 88, 665. [↑](#footnote-ref-183)
184. Anderson, above n 8, 108. [↑](#footnote-ref-184)
185. Quick and Garran, above n 43, 912. [↑](#footnote-ref-185)
186. See further *Guidelines on Regional State Aid for 2014-2020* [2013] OJ C 209/01. [↑](#footnote-ref-186)
187. *Federal Constitution of the Swiss Federation of 18 April 1999* arts 103, 127(2) [Federal Council (Switzerland) trans, *Bundesverfassung der Schweizerischen Eidgenossenschaft* (1999)

< https://www.admin.ch/opc/en/classified-compilation/19995395/201506140000/101.pdf >]. [↑](#footnote-ref-187)
188. *Federal Law on Regional Policy* (Switzerland) RS 901.0, 6 October 2006, art 12 [J Baughurst trans, Loi fédérale sur la politique régionale du 6 octobre 2006 RS 901.0]; Xavier Oberson and Howard Hull, *Switzerland in International Tax Law* (IBFD, 2011) 73-4; Federal Department of Finance (Switzerland), *Federal, Cantonal and Communal Taxes* (2016) 30, 53-55 <https://www.estv.admin.ch/estv/en/home/allgemein/dokumentation/

publikationen/weitere-publikationen/kurzabriss-ueber-das-schweizerische-steuersystem.html >. [↑](#footnote-ref-188)
189. (2013) 250 CLR 548, 584; cf Zone Allowances Inquiry, above n 25, 5. [↑](#footnote-ref-189)
190. *McCloy* (2015) 89 ALJR 857, 862-3 (French CJ, Kiefel, Bell and Keane JJ). [↑](#footnote-ref-190)
191. Ibid 875. [↑](#footnote-ref-191)
192. Ibid 875-6. [↑](#footnote-ref-192)
193. Ibid 876. [↑](#footnote-ref-193)
194. Ibid. [↑](#footnote-ref-194)
195. Ian Manning, ‘Income Tax Zone Rebates’ (2013) 68 *National Economic Review* 23, 38. [↑](#footnote-ref-195)
196. Zone Allowances Inquiry, above n 25, 1, 47. [↑](#footnote-ref-196)
197. Ibid 33-4. [↑](#footnote-ref-197)
198. Manning, above n 195, 47. [↑](#footnote-ref-198)
199. (2013) 250 CLR 548, 567, 600, 606-7, 622-3, 634. [↑](#footnote-ref-199)
200. Zone Allowances Inquiry, above n 25, 19. [↑](#footnote-ref-200)
201. Ibid 31. [↑](#footnote-ref-201)
202. Manning, above n 195, 33. [↑](#footnote-ref-202)
203. Peter Harris and David Oliver, *International Commercial Tax* (Cambridge University Press, 2010) 59-60. [↑](#footnote-ref-203)
204. See Part VII(C). [↑](#footnote-ref-204)
205. Manning, above n 195, 24. [↑](#footnote-ref-205)
206. *Tax and Superannuation Laws Amendment (2015 Measures No. 5) Act 2015* (Cth) s 3, sch 2. [↑](#footnote-ref-206)
207. Commonwealth, *Parliamentary Debates*, House of Representatives, 15 October 2015, 11308 (Kelly O’Dwyer, Assistant Treasurer) (emphasis added). [↑](#footnote-ref-207)
208. Explanatory Memorandum, Tax and Superannuation Laws Amendment (2015 Measures No 5) Bill 2015 (Cth) 18. [↑](#footnote-ref-208)
209. Commonwealth, *Parliamentary Debates,* House of Representatives, 19 April 1945, 924 (Joseph Chifley, Treasurer). [↑](#footnote-ref-209)
210. Zone Allowances Inquiry, above n 25, 3. [↑](#footnote-ref-210)
211. Manning, above n 195, 37. [↑](#footnote-ref-211)
212. *Income Tax and Social Services Contribution Assessment Act (No. 3) 1956* (Cth) s 23; *Income Tax Assessment Amendment Act 1982* (Cth) s 10. [↑](#footnote-ref-212)
213. Commonwealth, *Parliamentary Debates,* House of Representatives, 24 March 1982, 1368 (John Howard, Treasurer); Explanatory Memorandum, Income Tax Assessment Amendment Bill 1982 (Cth) 23. [↑](#footnote-ref-213)
214. Commonwealth, Australia’s Future Tax System Review, *Report to the Treasurer* (December 2009), pt 2, vol 1, 90. [↑](#footnote-ref-214)
215. Manning, above n 195, 37. [↑](#footnote-ref-215)
216. Commonwealth, *Our North, Our Future: White Paper on Developing Northern Australia* (2015) 104. [↑](#footnote-ref-216)
217. Rose, above n 14, 67, referring to the arbitrariness in *Cameron*. [↑](#footnote-ref-217)
218. See further Australian Taxation Office, *Income Tax: Zone Rebate for Residents of Isolated Areas*, TR 94/27, 25 August 1994, 6-7; Australian Taxation Office, *The Australian Zone List,* PSLA 2002/6, 4 February 2002, [1]. [↑](#footnote-ref-218)
219. Zone Allowances Inquiry, above n 25, 6. [↑](#footnote-ref-219)
220. Cf *Constitution* s 51(xxiiiA), which would not support legislation granting social security payments to all persons in a designated location. Thus, payments under the tax system will be necessary for persons ineligible for social security. [↑](#footnote-ref-220)
221. *Constitution* s 96. [↑](#footnote-ref-221)
222. *McCloy* (2015) 89 ALJR 857, 876. [↑](#footnote-ref-222)