



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S202/2021
File Title: Hornsby Shire Council v. Commonwealth of Australia & Anor
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Defendants
Date filed: 18 Apr 2023

Important Information

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

HORNSBY SHIRE COUNCIL

Plaintiff

AND:

COMMONWEALTH OF AUSTRALIA

First Defendant

STATE OF NEW SOUTH WALES

Second Defendant

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OUTLINE OF ORAL SUBMISSIONS OF THE FIRST DEFENDANT

PART I: INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

A. NOTIONAL GST IS NOT A TAX (Special case Q1 and Q2)

Political agreement between the Commonwealth and the States (Cth [7]-[14])

2. The impugned provisions were enacted to give effect to cll 17 and 18 of the 1999 Agreement (**SCB 155-178; 121 [14]-[17]**). The purposes of cl 17 were to ensure the input tax credit system was not disrupted and to give effect to principles of competitive neutrality: Competition Principles Agreement (**SCB 135-140; 120 [12]-[13]**).
- 10 3. “Notional GST” may be contrasted with “actual GST”. Actual GST expressly is not imposed on State property: *A New Tax System (Goods and Services Tax Imposition – General) Act 1999* (Cth) (**Vol 2, Tab 7**) s 5.

Section 96 grants and s 114 of the Constitution (Cth [15]-[19])

4. The payments that are withheld from the Plaintiff if it decides not to pay notional GST are a part of grants of financial assistance by the Commonwealth to NSW under s 96 of the Constitution and the *Local Government (Financial Assistance) Act 1995* (Cth) (**Vol 1, Tab 5**). Those grants are made on the condition that NSW will make payments to local governments if the relevant conditions are satisfied. The Plaintiff has no entitlement to receive any funds under that Act, at least when the conditions have not been satisfied.
- 20 5. Grants of financial assistance under s 96 are voluntary, meaning that a State is under no obligation to accept a grant if it does not wish to accept any condition upon the grant: *First Uniform Tax Case* (1942) 65 CLR 373 (**Vol 11, Tab 73**) at 417, 428 (Latham CJ), 455 (McTiernan J), 463 (Williams J); *Second Uniform Tax Case* (1957) 99 CLR 575 (**Vol 11, Tab 80**) at 605, 610 (Dixon CJ), 636-637 (Williams J), 642-643 (Webb J).
6. For three reasons, ss 96 and 114 do not intersect. *First*, s 96 deals with voluntary payments to States whereas s 114 deals with compulsory exactions from States. *Second*, a law validly enacted pursuant to s 96 cannot be a compulsory exaction from the State because it depends on voluntary acceptance by the State. *Third*, even if a Commonwealth law made it a condition of a grant under s 96 that a State impose an obligation upon its own
30 instrumentalities to make a payment in respect of its own property (which NSW has not done), the resulting obligation would not be a Commonwealth tax to which s 114 applies.

7. There is no analogy with the interaction between ss 96 and 51(xxxi), because a law granting financial assistance may be properly characterised as a law with respect to the acquisition of property if a condition of the grant requires such an acquisition by someone other than the Commonwealth: *ICM* (2009) 240 CLR 140 (**Vol 7, Tab 44**) at [42] (French CJ, Gummow and Crennan JJ, Heydon J agreeing at [174]), [133] (Hayne, Kiefel and Bell JJ). Nor is there any analogy with s 116, because a law granting financial assistance may have the purpose that is prescribed by s 116 even if the prohibited actions are undertaken by someone else: *Kruger* (1997) 190 CLR 1 (**Vol 8, Tab 47**); *DOGS Case* (1981) 146 CLR 559 (**Vol 4, Tab 27**) at 593 (Gibbs J), 650 (Wilson J). By contrast, only the Commonwealth can impose a Commonwealth tax.

Relevant aspects of the legislative scheme (Cth [20]-[34])

8. The *Local Government (Financial Assistance) Act 1995* (Cth) (**Vol 1, Tab 5**) provides the framework for Commonwealth grants of financial assistance to the States for local government purposes (s 3). States are entitled to grants (ss 9, 11) on conditions (s 15).
9. The *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) (**Vol 2, Tab 8**) empowers, but does not require, State entities to pay notional GST (s 5).
10. The *Federal Financial Relations Act 2009* (Cth) (**Vol 1, Tab 4**) provides for GST revenue grants to States (s 5) and specifies the formula for calculating GST revenue, which includes notional GST whether or not it has been paid by local governments (s 6).
11. The *GST Act* (Cth) (**Vol 2, Tab 6**) enables recipients of supplies from States to claim input tax credits on notional GST (s 177-3): *Landcom* (2022) 114 ATR 639 (**Vol 13, Tab 91**) at [27]-[32], [47].

Local Govt Financial Assistance Act, ss 15(aa) and (c) do not impose tax (Cth [36]-[49])

12. No legal compulsion arises from ss 15(a) and (c). *First*, s 15(aa) creates no liability on the part of the Plaintiff. *Second*, the words “should have, but have not, been paid” do not suggest that the Plaintiff is required to pay notional GST. *Third*, any legal obligations are directed to the State not the Plaintiff. *Fourth*, no money is “taken” from or “lost” by the Plaintiff. *Fifth*, s 15(c) does not facilitate indirect exaction by the Commonwealth.
13. Assuming it would be sufficient to render a charge a tax, no practical compulsion arises from those provisions. Practical compulsion requires some sanction or detriment that vitiates what otherwise appears to be a choice: *Homebush Flour Mills* (1937) 56 CLR

390 (**Vol 4, Tab 26**) at 399-400 (Latham CJ), 404-405 (Rich J), 408 (Starke J), 409-413 (Dixon J), 417 (Evatt J), 421 (McTiernan J). The conditions in ss 15(aa) and (c) create no sanction or detriment: if the Plaintiff chooses not to pay notional GST, the only consequence is that it does not receive a payment that would have offset the payment of notional GST. Nor is there anything that can be described as a “forced benevolence”.

Legislative scheme as a whole does not impose tax (Cth [50]-[56])

14. The concept of a “circuitous device” directs attention to the practical operation of a law. None of the impugned provisions impose a tax, let alone a Commonwealth tax.

B. ALTERNATIVELY, OTHER RELIEF SHOULD NOT ISSUE (Special Case Q3)

10 **No constitutional right of recovery (Cth [58]; cf PS [60]-[62])**

15. The invalidity of “notional GST” would not confer a constitutional right to recover payments. A breach of the Constitution does not create a private law action: *Antill Ranger* (1955) 93 CLR 83 (**Vol 4, Tab 25**) at 99; *Kruger* (1997) 190 CLR 1 (**Vol 8, Tab 47**) at 46 (Brennan CJ), 125 (Gaudron J), 147-148 (Gummow J); *BAT* (2003) 217 CLR 30 (**Vol 5, Tab 30**) at [39]-[41] (McHugh, Gummow and Hayne JJ).


Recovery of invalid taxes is subject to reasonable regulation (Cth [60]-[61]; cf PS [67])

16. The right to recover invalid taxes may be subjected to reasonable regulation, such as a limitation period or requiring a particular process to be followed: *Antill Ranger* (1955) 93 CLR 83 (**Vol 4, Tab 25**) at 99-100, 103; *BAT* (2003) 217 CLR 30 (**Vol 5, Tab 30**) at [19];
20 *Barton* (1957) 97 CLR 633 at 659-60; *Sims* [2022] NSWCA 195 (**Vol 14, Tab 94**) at [97].

Taxation Administration Act, Pt IVC provides a means of recovery (Cth [62])

17. Any recovery of “notional GST” can only be by the processes in the *Taxation Administration Act 1953* (Cth) (**Vol 3, Tab 17**). Part IVC of that Act sets out a method for challenging an “excessive” assessment, which could include amounts of notional GST. Until an assessment is amended, the amount assessed is payable: Sch 1 ss 155-75, 155-85, 155-90, 350-10; *Landcom* (2022) 114 ATR 639 (**Vol 13, Tab 91**) at [132], [135]-[136]; *Lamesa Holdings* (1999) 92 FCR 210 (**Vol 13, Tab 90**) at [105]-[106]; *SCI Operations* (1998) 192 CLR 285 (**Vol 5, Tab 32**) at [64]-[65], [76].

Dated: 18 April 2023

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