



## 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  
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#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
 SYDNEY REGISTRY

BETWEEN:

HORNSBY SHIRE COUNCIL  
 Plaintiff

and

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COMMONWEALTH OF AUSTRALIA  
 First Defendant

STATE OF NEW SOUTH WALES  
 Second Defendant

**SECOND DEFENDANT'S  
 OUTLINE OF ORAL SUBMISSIONS**

**Part I: Publication**

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

**Part II: Outline of Oral Submissions**

2. The only issue necessary to determine is whether the various provisions impugned by the Plaintiff impose a tax on property of the Plaintiff. The attributes of a “tax” are well established: Matthews v Chicory Marketing Board (Victoria) (1938) 60 CLR 263 (JBA Vol 8, Tab 52) at 276 (Latham CJ). The inquiry is not assisted by separately asking whether there is a “forced benevolence” or a “circuitous device”: Attorney-General for New South Wales v Homebush Flour Mills Limited (1937) 56 CLR 390 (**Homebush Flour Mills**) (JBA Vol 4, Tab 26) at 400 (Latham CJ). See the submissions of the State of New South Wales (NS) at [4], [36]-[41].
- 30 3. The impugned provisions do not impose a tax on property of any kind of the Plaintiff because: they do not compulsorily exact money from the Plaintiff; any payment of money from the Plaintiff is not enforceable by law; and no analogy can properly be

drawn to Homebush Flour Mills. See NS [42]-[59].

4. The impugned provisions do not compulsorily exact money from the Plaintiff.
  - a. The conditions in s 15(aa) and (c) of the Local Government (Financial Assistance) Act 1995 (Cth) (**LGFA Act**) only purport to impose obligations on a State and do not contemplate any exaction from the Plaintiff.
  - b. The Plaintiff does not establish the presence of compulsion by identifying the prospect that the total amount of its allocation of financial grants under the LGFA Act will be reduced by an amount corresponding to the amount of notional GST not paid to the Commonwealth. The Plaintiff has no entitlement to the total amount of any allocation of financial assistance.
  - c. The Plaintiff is presented with a “real choice” whether to pay notional GST. Non-payment of notional GST does not contravene any law or regulation: see s 5 of the NSW Intergovernmental Agreement Implementation (GST) Act 2000 (JBA Vol 2, Tab 8) and s 9 of the NSW Interpretation Act 1987 (JBA Vol 3, Tab 18). Compliance with circulars (see Special Case Book (**SCB**) 122 [20]), which have no statutory force, is not mandatory: SCB 210.
  
5. The conditions purportedly imposed by s 15 of the LGFA Act do not impose any legally enforceable obligation which could be the subject of legal remedy if not observed by the State in question. Section 96 of the Constitution embodies a political rather than a legal process: see South Australia v Commonwealth (1962) 108 CLR 130 (JBA Vol 11, Tab 75) at 149 (McTiernan J), 149 (Taylor J), 154 (Windeyer J); see by analogy John Cooke & Co Pty Ltd v Commonwealth (1922) 31 CLR 394 (JBA Vol 8, Tab 46) at 416. Cf Victoria v Commonwealth (Second Uniform Tax Case) (1957) 99 CLR 575 (JBA Vol 11, Tab 80); Attorney General (Vic) v Commonwealth (1981) 146 CLR 559 (JBA Vol 4, Tab 27) at 618 (Mason J) and 660 (Wilson J). The conditions in s 15 do not create public rights which could be enforced by the Attorney General: see Ramsay v Aberfoyle Manufacturing Co (1935) 54 CLR 230 (JBA Vol 10, Tab 67) at 243 (Latham CJ).

Dated: 19 April 2023

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M G Sexton SC SG

M O Pulsford