HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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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

SECOND DEFENDANT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: STATEMENT OF ISSUES

2. The parties have stated the questions of law to be decided in this matter in the Special Case (see Special Case Book ("SCB") 131 [68]).

3. The State of New South Wales ("NSW") contends that the central issue for this Court to determine is whether the various provisions impugned by the Plaintiff ("the impugned provisions"), being:

   a. ss 6(8), 11(3), 14(3), 15(aa) and 15(c) of the Local Government (Financial Assistance) Act 1995 (Cth) ("Local Government Financial Assistance Act");

   b. ss 6(3)(a)(ii) and 6(3)(c) of the Federal Financial Relations Act 2009 (Cth) ("Federal Financial Relations Act"); and

   c. ss 4 and 5 of the Intergovernmental Agreement Implementation (GST) Act 2000 (NSW) ("NSW Implementation Act"),

on their own or in combination, impose a tax on property belonging to the Plaintiff.

4. All of the arguments advanced by the Plaintiff depend on the validity of the "central proposition" (ICM Agriculture Pty Ltd v The Commonwealth (2009) 240 CLR 140 ("ICM") at [107] per Hayne, Kiefel and Bell JJ) that there was such an imposition. For the reasons identified in Pt V below, that contention cannot be accepted. The present proceedings accordingly do not provide an appropriate occasion for this Court to consider the interaction, if any, of s 114 of the Constitution with the Commonwealth's power in s 96 of the Constitution to grant financial assistance to a State "on such terms and conditions as the Parliament thinks fit".

10 5. NSW does not wish to be heard in relation to the issue of restitution.

Part III: NOTICE UNDER SECTION 78B

6. The Plaintiff has given sufficient notice under s 78B of the Judiciary Act 1903 (Cth).

Part IV: MATERIAL FACTS

7. NSW relies upon the facts in the Special Case.

8. The Plaintiff has not set out a narrative statement of relevant facts. Given the Plaintiff's approach, NSW addresses the contested inferences to be drawn from the Special Case in Part V below including:

   a. The Plaintiff's entitlement to payments under the Local Government Financial Assistance Act (see [49] below); and

20 b. The consequences of the Plaintiff failing to pay "notional GST" (see [50]-[53]).

9. Consistently with the Special Case (SCB 121 [17]), these submissions use "notional GST" to refer to the "voluntary or notional payments" referred to in cl 17 of the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations (see [22] below).

Part V: ARGUMENT

The goods and services tax complies with s 114 of the Constitution

10. It is convenient to begin the analysis by identifying that the goods and services tax complies with s 114 of the Constitution.

Section 114

11. Section 114 of the Constitution, in Ch V of the Constitution ("The States"), provides that the Commonwealth shall not "impose any tax on property of any kind belonging to a State".

12. As unanimously explained in Deputy Commissioner of Taxation v State Bank of New South Wales (1992) 174 CLR 219 ("State Bank") at 227 (citations omitted), this prohibition:

> … protects the property of a State from a tax on the ownership or holding of property … it does not protect the State from a tax on transactions which affect its property, unless the tax can be truly characterized as a tax on the ownership or holding of property. …

13. The reference to a State in s 114 of the Constitution includes its agencies and instrumentalities (see State Bank at 229-230) and it is common ground that the Plaintiff is "included within the meaning of a 'State' for [the] purposes of s 114": SCB 127 [49](c).

14. A tax on the proceeds of sale of property has been identified to be a tax within the ambit of the prohibition in s 114 "because it is an indirect means of taxing the ownership of property": Queensland v Commonwealth (1987) 162 CLR 74 at 98 per Mason, Brennan and Deane JJ; see also 105 per Dawson J.

The goods and services tax

15. In Sterling Guardian Pty Ltd v Commissioner of Taxation (2006) 149 FCR 255 at [15], in remarks approved by this Court (see Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd (2008) 236 CLR 342 at [3]), the Full Federal Court explained that while:

> [i]n economic terms it may be correct to call the GST a consumption tax, because the effective burden falls on the ultimate consumer… as a matter of legal analysis what is taxed… is not consumption but a particular form of transaction, namely supply...

16. The A New Tax System (Goods and Services Tax) Act 1999 (Cth) ("GST Act"), which binds the States (see s 1-4 of the GST Act), provides that "GST is payable on *taxable supplies" (s 7-1) and that the "GST payable on any *taxable supply" must

be paid (s 9-40). "[T]axable supply" and "supply" are defined in s 9-5 and s 9-10 of the GST Act; a person makes a taxable supply if they make a supply (being "any form of supply whatsoever", including a supply of goods) connected with the indirect tax zone in the course of or furtherance of an enterprise and the person is registered or required to be registered under the GST Act. The Plaintiff carries on an enterprise and is registered for GST under the GST Act: SCB 128, [50].

17. With respect to the application of the GST Act to the property of States, it is critical to observe that "GST" is a defined term in the GST Act (see s 3-1 and item 6 of s 3-5(3) of the GST Act), with s 195-1 of the GST Act defining "GST" as "tax that is payable under the *GST law and imposed as goods and services tax by any of" six specified imposition statutes.

18. Adopting the "well-established procedure to comply" with s 55 of the Constitution (see Roy Morgan Research Pty Ltd v Commissioner of Taxation (2011) 244 CLR 97 ("Roy Morgan") at [5]), each those imposition statutes only impose, and fix the rate of, GST. For example, the A New Tax System (Goods and Services Tax Imposition—General) Act 1999 (Cth) ("General GST Imposition Act") provides, in s 3(1), that "[t]he tax that is payable under the GST law (within the meaning of the [GST Act]) is imposed by this section under the name of goods and services tax (***GST***)" (s 3(1)) and, in s 4, that "[t]he rate of goods and services tax payable under the [GST Act] is 10%".

19. The imposition of goods and services tax by the imposition statutes is qualified by s 5 of each statute. Section 5 of the General GST Imposition Act relevantly provides:

> **Act does not impose a tax on property of a State**
>
> (1) This Act does not impose a tax on property of any kind belonging to a State.
>
> (2) Property of any kind belonging to a State has the same meaning as in section 114 of the Constitution.

20. States are, as a result, not liable to pay GST under the GST Act to the extent it would impose a tax on property of any kind belonging to a State within the meaning of s 114 of the Constitution.

Agreement for NSW to voluntarily pay notional GST

21. The exclusion of States from goods and services tax with respect to the supplies of property was inconsistent with the States' commitment to competitive neutrality (see SCB 129 [12]-[13]) and the scheme of the GST Act. As Perram J observed in TT-Line Company Pty Ltd v Federal Commissioner of Taxation [2009] FCAFC 178; 181 FCR 400 ("TT-Line") at [66], "[a]t least in relation to the provision of supplies of property, the interposition of the State at any point along the supply chain would have disrupted the process of credits upon which the system depends". See also Landcom v Commissioner of Taxation [2022] FCA 510 ("Landcom") at [28]-[30] per Thawley J; an appeal from Landcom brought by the Commissioner of Taxation was heard by the Full Court of the Federal Court on 21 November 2022, but related only to Thawley J's consideration of the margin scheme provisions in Division 75 of the GST Act.

22. On 22 June 1999, the heads of Commonwealth, State and Territory governments signed the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations ("1999 Agreement") in connection with the introduction of a goods and services tax by the Commonwealth: see SCB 121 [14]-[15]. Under the heading "Application of the GST to Government", cl 17 of the 1999 Agreement provided (SCB 158):

> The Parties intend that the Commonwealth, States, Territories and local governments and their statutory corporations and authorities will operate as if they were subject to the GST legislation. They will be entitled to register, will pay GST or make voluntary or notional payments where necessary and will be entitled to claim input tax credits in the same way as non-Government organisations. All such payments will be included in GST revenue.

23. The content of cl 17 is now found in cl 28 of Schedule A of the new Intergovernmental Agreement on Federal Financial Relations, which commenced on 1 January 2009 ("2009 Agreement"): SCB 122-123 [23]-[25]; SCB 248.

24. Clause 18 of the 1999 Agreement stated (SCB 158):

> The Commonwealth will legislate to require the States and the Northern Territory to withhold from any local government authority being in breach

> of Clause 17 a sum representing the amount of unpaid voluntary or notional GST payments. Amounts withheld will form part of the GST revenue pool. Detailed arrangements will be agreed by the Ministerial Council on advice from Heads of Territories.

25. The reference to amounts being withheld by the States was an apparent reference to grants of financial assistance for local government purposes to States under the Local Government Financial Assistance Act. Unlike the approach taken under an earlier version of the inter-governmental agreement, and due to a reduced revenue base for the GST, those grants were not to be repealed under the 1999 Agreement: see SCB 119 [9], 121 [14]-[15].

Implementation of the agreement by the Commonwealth

26. The object of the Local Government Financial Assistance Act is to "provide financial assistance to the States" for the purposes of improving various matters relating to local governing bodies: see s 3(2)(a)-(e). That assistance is to be provided "by the making to the States, for local government purposes, of general grants under section 9 and additional funding under section 12": s 3(3).

27. Section 9 of the Local Government Financial Assistance Act provides that, subject to s 9 and s 11, each State is entitled, in respect of a year, by way of financial assistance for local government purposes, to the payment of a general grant of an amount calculated by a statutory formula: see also SCB 125 [38]. States are not legally obliged to accept such grants, which are made pursuant to s 96 of the Constitution: SCB 119 [6], [9] and 120 [10].

28. If accepted by a State, a grant under s 9 is made on the conditions specified in s 15 of the Local Government Financial Assistance Act: SCB 125 [40](b). Section 15 provides that:

> Payment of an amount to a State (other than the ACT) under this Act in respect of a year is subject to:
>
> (a) a condition, subject to the condition in paragraph (aa), that the State will:
>
> (i) if the payment is made under section 9—without undue delay, make unconditional payments to local governing

bodies in the State in accordance with the allocation determined as mentioned in section 11; …

(aa) a condition that, if the payment is one from which, according to an agreement between the Commonwealth and the State, the State is to withhold an amount that represents voluntary GST payments that should have, but have not, been paid by local governing bodies—the State will withhold the amount and pay it to the Commonwealth;

…

(c) a condition that, if the Minister tells the Treasurer of the State that the Minister is satisfied that the State has, with respect to the whole or a part of the amount, failed to fulfil any of the conditions applicable under paragraphs (a), (aa) and (b) to the payment of the amount, the State will repay to the Commonwealth any amount determined by the Minister that is not more than the amount in respect of which the Minister is so satisfied.

29. Section 15(aa), together with the references to s 15(aa) in s 15(a) and (c), were inserted by the Local Government (Financial Assistance) Amendment Act 2000 (Cth) ("2000 Amendment Act") to give effect to the undertaking in cl 18 of the 1999 Agreement: see the Second Reading of the Local Government (Financial Assistance) Amendment Bill 2000, SCB 180.

30. The 2000 Amendment Act also inserted ss 6(8), 11(3) and 14(3) of the Local Government Financial Assistance Act. They provide that "any possibility of a reduction in the amount allocated to any local governing body in complying with the condition in paragraph 15(aa) is to be disregarded" for the purposes of ss 6, 11 and 14 of the Act, which concern the determination of allocations among local governing bodies.

31. The agreement in cls 17 and 18 of the 1999 Agreement that notional GST payments, and the amounts of notional GST which had not been paid by local government bodies, were to be included in the GST revenue, which was to be distributed to the States and Territories (see cl 7 of the 1999 Agreement, SCB 157), is given effect in the Federal Financial Relations Act. Section 6 of the Federal Financial Relations Act provides that the calculation of GST revenue includes:

a. "the payments made to the Commissioner of Taxation representing amounts of GST that would have been payable if the Constitution did not prevent tax from being imposed on property of any kind belonging to a State and section 5 of the GST Imposition Acts had not been enacted": s 6(3)(a)(ii); and

b. "the amount, determined in a manner agreed by the Commonwealth and all of the States, that represents amounts of voluntary GST payments that should have, but have not, been paid by local government bodies": s 6(3)(c).

32. The difficulty identified by Perram J (see [21] above) was addressed by s 177-3 of the GST Act. Section 177-3 provides that where an "Australian government agency" (defined in the Income Tax Assessment Act 1997 (Cth) as, relevantly, as a State or an authority of a State) makes a supply to another entity and includes "an amount relating to the agency's notional liability for GST on the supply" in the consideration for the supply even though the agency "is not liable for GST on the supply", "the *GST law applies in relation to the other entity as if: the supply were a *taxable supply to that entity; and the amount of GST for which the agency is notionally liable on the supply is the amount of GST payable on the supply". The Plaintiff, as an authority of NSW, is an "Australian government agency": SCB 128 [49](f).

Implementation of the agreement by NSW

33. NSW enacted the NSW Implementation Act to give effect to the 1999 Agreement: see the Long Title; SCB 122 [19]. Section 4(1) of the Act identifies that a copy of the 1999 Agreement is set out in Schedule 1 to the Act. Section 4(2) states that "[i]t is the intention of the State to comply with, and give effect to, the [1999 Agreement]". The inclusion of the 1999 Agreement as Schedule 1 does not give it operative effect: see Herzfeld and Prince, *Interpretation* (2nd ed, 2020) at [5.150]; cf Plaintiff's Submission ("PS") at [12], [50](b).

34. Section 5 of the NSW Implementation Act provides:

> **Payment of GST equivalents by State entities**
>
> A State entity may pay to the Commissioner of Taxation amounts representing amounts that would have been payable for GST if:
>
> (a) the imposition of that GST were not prevented by section 114 of the Commonwealth Constitution, and
>
> (b) section 5 of each of the GST Imposition Acts had not been enacted,

and may do things of a kind that it would be necessary or expedient for it to do if it were liable for that GST.

35. Section 3 of the NSW Implementation Act defines a "State entity" as "a person who is not liable for GST that the person would be liable for" if the imposition of that GST were not prevented by s 114 of the Constitution, and s 5 of each of the GST Imposition Acts had not been enacted. "GST" has the same meaning as in the GST Act: see [16] above. The "GST Imposition Acts" are defined as the General GST Imposition Act as well as the A New Tax System (Goods and Services Tax Imposition—Customs) Act 1999 (Cth) and A New Tax System (Goods and Services Tax Imposition—Excise) Act 1999 (Cth), which separately impose GST to the extent it is a duty of customs or a duty of excise.

Identifying an imposition of a tax

36. As identified at [4] above, the only issue necessary for this Court to determine is whether the impugned provisions, either on their own, or in combination, impose a tax on property of the Plaintiff.

37. The relevant principles are not in doubt. Drawing from Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd [1933] AC 168 ("Lower Mainland") at 175, in Matthews v Chicory Marketing Board (Victoria) (1938) 60 CLR 263 at 276, Latham CJ considered that a levy constituted a tax because it was "compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered". While cautioning that it is not an "exhaustive definition of a tax", this Court has accepted it "as an acceptable general statement of positive and negative attributes which, if they all be present, will suffice to stamp an exaction of money with the character of a tax": Air Caledonie International v The Commonwealth (1988) 165 CLR 462 at 466-468; Northern Suburbs General Cemetery Reserve Trust v The Commonwealth (1993) 176 CLR 555 at 566-567 per Mason CJ, Deane, Toohey and Gaudron JJ and 587 and 590 per Dawson J; see also Roy Morgan at [36]-[42])).

38. It is "the creation of the liability, which is the 'imposition' of the tax": Re Dymond (1959) 101 CLR 11 at 19 per Fullagar J.

39. The inquiry is not assisted by separately asking whether there is "forced benevolence" or a "circuitous device". Asking whether there is a "forced

benevolence" (see PS [2](b), [41]-[47]) is simply another way of asking whether there is an imposition of taxation: see Attorney-General for New South Wales v Homebush Flour Mills Limited (1937) 56 CLR 390 ("Homebush Flour Mills") at 400 per Latham CJ; see also Health Insurance Commission v Peverill (1994) 179 CLR 226 at 253 per Dawson J. Similarly, for there to be a "circuitous device", there must still be an imposition of taxation on property of the Plaintiff: ICM at [139] per Hayne, Kiefel and Bell JJ; see also at [45] per French CJ, Gummow and Crennan JJ and [191]-[192] per Heydon J.

40. In this respect, a circuitous device is not identified by the purpose of the impugned provisions: cf PS [27], [48]-[49]. The impugned provisions would not be invalid even if this Court found that their *object* was to overcome the Commonwealth's inability to impose GST contrary to s 114 of the Constitution: see Homebush Flour Mills at 398 and 402 per Latham CJ and 414 per Dixon J. Relevantly, in ICM, at [36], French CJ, Gummow and Crennan JJ (see also at [174] per Heydon J) observed that the "concept of improper purpose as a vitiating characteristic was rightly rejected" in Pye v Renshaw (1951) 84 CLR 58. Chief Justice French, Gummow and Crennan JJ explained that:

> … Section 96 says nothing about purpose. It authorises the making of grants on "such terms and conditions as the Parliament thinks fit". The constraints imposed by constitutional prohibitions or guarantees will be directed to the range of permissible terms and conditions rather than their underlying purpose.

41. See also Spencer v The Commonwealth (2018) 262 FCR 344 at [166] per Griffiths and Rangiah JJ and [354] per Perry J.

The impugned provisions do not impose a tax on property of the Plaintiff

42. None of the impugned provisions (see [28], [30], [31] and [33]-[34] above), either on their own or in combination, impose a tax on property of any kind of the Plaintiff because:

a. they do not compulsorily exact money from the Plaintiff;

b. any payment of money from the Plaintiff is not enforceable by law; and

c. no analogy can properly be drawn between the impugned provisions and Homebush Flour Mills.

There is no compulsory exaction of money

43. The impugned provisions do not impose a tax on property of any kind of the Plaintiff because there is no compulsory exaction of money. "Compulsion is an essential feature of taxation": Lower Mainland at 175; Victoria v Commonwealth (1971) 122 CLR 353 at 416 per Gibbs J.

44. None of the impugned provisions make the Plaintiff liable to pay notional GST.

45. Section 15(aa) of the Local Government Financial Assistance Act, which the Plaintiff identifies as the "collection mechanism and point of impost" and the "principal provision" imposing taxation, cannot be understood to compulsorily exact notional GST from the Plaintiff (cf PS [2](a), [39]) having regard to the following matters.

a. The conditions in s 15(aa) and (c) do not impose any obligation on the Plaintiff; the only obligations that those provisions purport to impose are on a State who accepts, and receives, grants under the Local Governance Financial Assistance Act. Section 15(aa) purports only to impose a condition on the grant to NSW that, if the Plaintiff does not pay to the Commissioner of Taxation an amount of notional GST, the State will withhold that amount from the amount allocated to the Plaintiff and pay that amount to the Commonwealth: SCB 125-126 [41](a). The condition in s 15(aa), and the condition in s 15(c), do not *compel* the State to do anything (cf PS [38], [38](a) and [40]) and do not impose any legally enforceable obligation on the State.

b. The words "should have, but have not, been paid" in s 15(aa) do not impose any obligation on the Plaintiff: cf PS [38](e) and [39]. The words are a reference to cl 17 of the 1999 Agreement and cl 28 of Schedule A (see [22]-[23] above) which record only an "inten[t]" for governmental bodies to "operate as if they were subject to the GST legislation". In remarks particularly applicable to cls 17 and 28, those agreements "contain statements of political intent and do not contain terms from which it should be concluded that either agreement creates legal rights or obligations": Landcom at [36]. The inclusion of those words does not "mean[] that the plaintiff was required or obliged to pay the notional GST": cf PS [39].

c. The exaction *contemplated* by s 15(aa) is not the payment of notional GST by the Plaintiff (cf PS [46]) and, under s 15(aa), the Commonwealth does not "receive" any amount from the Plaintiff: cf PS [38](b). The operation of the condition in s 15(aa) is premised on the Plaintiff having *not* paid notional GST to the Commonwealth. Assuming NSW complies with the condition in s 15(aa) of the Local Government Financial Assistance Act, NSW collects nothing from the Plaintiff and the amount of money that NSW would withhold and pay to the Commonwealth would be an amount from the Commonwealth's grant to the State of financial assistance for local government purposes. The amount will have been paid to NSW out of the Consolidated Revenue Fund by the Commonwealth in accordance with appropriations made by s 22 of the Financial Relations Act 2009: SCB 125 [37]. Notably, those grants are separate from, and additional to, GST revenue grants made under s 5 of the Financial Relations Act 2009: SCB 126 [42].

46. On the assumption that NSW would comply with the condition in s 15(aa), the Plaintiff is presented with a choice whether to pay notional GST.

a. If the Plaintiff pays notional GST to the Commonwealth, it will receive the total amount of any allocation of financial grants under the Local Government Financial Assistance Act; or

b. If the Plaintiff does not pay notional GST to the Commonwealth, the total amount of its allocation of financial grants under the Local Government Financial Assistance Act will be reduced by a corresponding amount.

47. The Plaintiff is not legally compelled to pay notional GST. Assuming, as Gibbs J did in The General Practitioners Society v The Commonwealth (1980) 145 CLR 532 ("General Practitioners Society") at 561, that "practical compulsion" is sufficient to give rise to a tax, there is no practical compulsion. The Plaintiff has a "real choice" (General Practitioners Society at 550 per Gibbs J).

48. The Plaintiff's argument that it is compelled to pay notional GST rests on two premises, namely (1) that it is "otherwise entitled" to the total amount of any allocation to the Plaintiff of financial assistance for local government purposes (see PS [38](c), [39], [46] and [59](d)); and/or (2) that there will be "detrimental consequences" if the Plaintiff chooses not to pay notional GST (PS [38](c) and [38](d)). Neither premise can be accepted.

49. The Plaintiff is not entitled, or "otherwise entitled", to the total amount of any allocation of financial assistance for local government purposes in circumstances where:

a. The Local Government Financial Assistance Act confers entitlements on States (see [26]-[27] above); it does not confer any entitlement on local governing bodies, such as the Plaintiff.

b. States are not legally obliged the accept the grants and may decline to accept a grant from the Commonwealth for any financial year: SCB 120 [10]-[11].

c. The payment of an amount to a State, and the condition that the State pay amounts allocated to local governing bodies "without undue delay" (see s 15(a)), are both expressly subject to the condition s 15(aa) that the State is to withhold any amounts of notional GST that have not been paid by local governing bodies.

It is thus incorrect to suggest that any amount of unpaid notional GST "will be taken from" the Plaintiff: cf PS [45].

50. There are no "detrimental consequences" for the Plaintiff if it chooses not to pay notional GST: cf PS [38](c). Given that any reduction in the amount of financial grant to be paid to the Plaintiff is to correspond with the amount of notional GST not paid by the Plaintiff, if the Plaintiff chooses not to pay notional GST, the net financial position of the Plaintiff would be identical to if the Plaintiff had paid notional GST. There is accordingly no risk of the Plaintiff being forced to function at a lower standard than other local governing bodies: cf PS [13], [38](c) and [59](e).

51. As for the prospect raised by the Plaintiff of "further review or adverse action" (see PS [38](d)), the Plaintiff choosing not to pay notional GST does not constitute "non-compliance with laws and regulations": cf PS [38](d). To the contrary, the NSW Implementation Act confers a discretionary power on the Plaintiff to pay notional GST. The use of the "may" in s 5 of the NSW Implementation Act indicates that the power conferred on State entities, like the Plaintiff (see SC [49](e)), to pay notional GST and do things of a kind necessary or expedient for the Plaintiff to do if it were liable for that GST "may be exercised or not, at discretion". In Landcom, at [43], Thawley J accepted that "the provisions of the NSW Implementation Act do not

create any obligations, enforceable by the Commissioner, to pay notional GST or any other notional tax".

52. The circulars issued by the NSW Government (see SCB 122 [20]), which relevantly provide for a council to certify that it has paid notional GST for a financial year "to assist with compliance with Section 114 of the Commonwealth Constitution" (see Circular 11-23, SCB 198-199), have no statutory force. The circulars, which are issued to provide guidance, technical assistance and encourage good practice, are "[n]ot mandatory": Improvement and Intervention Framework in relation to NSW Councils (May 2017), SCB 210.

10 53. Other than the assertion of the Plaintiff (see Annexure Q, SCB 295), there is no evidence that a failure by the Plaintiff to pay notional GST would lead to review or adverse action for the Plaintiff. There would not appear to be any necessary connection between the Plaintiff choosing not to pay notional GST and the provisions identified by the Plaintiff in the Local Government Act 1993 (NSW), which concern:

a. The power to obtain specified documents and information from a council: s 429.

b. The power to conduct an investigation into any aspect of a council or its work and activities: s 430.

20 c. The Minister's power to suspend a council if the Minister "reasonably believes that the appointment of an interim administrator is necessary to restore the proper or effective functioning of the council": s 438I.

d. The Governor or the Minister's power to appoint a commissioner to hold a public inquiry to report with respect to (s 438U):

i. "any matter relating to the carrying out of the provisions of this Act or any other Act conferring or imposing functions on a council"; and

ii. "any act or omission of a member of a council, any employee of a council or any person elected or appointed to any office or position under this or any other Act conferring or imposing functions on a council, being
30 an act or omission relating to the carrying out of the provisions of the Act concerned, or to the office or position held by the member, employee or

person under the Act concerned, or to the functions of that office or position".

e. The power to appoint an interim administrator (ss 438M and 438Y).

The exaction of money is not enforceable by law

54. The impugned provisions do not impose a tax on the property of the Plaintiff because payment of notional GST is not enforceable by law. As Thawley J observed in Landcom, at [42], the States' agreement to pay notional GST "does not give rise to any legal liability to pay" and is "not capable of enforcement by the Commonwealth": see also Landcom at [122], [158], [176], [179]. For example, none of the impugned provisions provide that amounts of notional GST that the Plaintiff chooses not to pay to the Commonwealth are a debt due to the Commonwealth, which can be sued for and recovered in a court of competent jurisdiction.

55. The principle in Mallinson v Scottish Australian Investment Company Ltd (1920) 28 CLR 66 ("Mallinson") at 70 does not establish the legal enforceability of any exaction of money from the Plaintiff: cf PS [39]-[40] and [46]. Subject to contrary provision, an action will lie for recovery of money if a statute creates a duty or obligation to pay: see The Commonwealth v SCI Operations Pty Ltd (1998) 192 CLR 285 at [65] per McHugh and Gummow JJ. There is, however, no statutory duty or obligation on the Plaintiff to pay notional GST to the Commonwealth or any amount to NSW if the Plaintiff chooses not to pay notional GST.

56. If the Plaintiff chooses to report notional GST and include it in the "GST on Sales" part of its BAS form as if it was actually liable for GST, that will have consequences under the Taxation Administration Act 1953 (Cth): see SCB 124 [34], [64]. Those consequences do not, however, attend, and cannot be used to enforce, the Plaintiff's anterior decision whether to report and pay notional GST. In any event, it may be noted that the assessments could be objected to by the Plaintiff, including on the ground that the assessment is excessive because of s 114 of the Constitution: Landcom at [136], [138].

No analogy can be drawn with Homebush Flour Mills

57. Contrary to PS [43]-[44], no analogy can properly be drawn between the impugned provisions and Homebush Flour Mills where the Flour Acquisition Act 1931 (NSW) was found to impose a tax notwithstanding that there was "no legal obligation to

pay" the relevant exaction: see Homebush Flour Mills at 413 per Dixon J. Justice Dixon, at 413, explained that the absence of a legal obligation to pay did not prevent the exaction fulfilling the description of a tax:

> … because in truth it is exacted by means of sanctions designed to that end, sanctions consisting in the detriments arising from the adoption by the tax-payer of the alternative left open by the legislation.

58. The option of not paying the exaction in Homebush Flour Mills was variously described as "quite illusory" and "quite unreal" (at 399 per Latham CJ), a "means of escape which no one would adopt if he considered the business and the pecuniary consequences" (at 405 per Rich J) and as exposing the prospective tax-payer to "greater burdens or worse consequences": at 412 per Dixon J; see also at 408 per Starke J. Plainly, the consequences for the Plaintiff of choosing not to pay notional GST cannot be characterised in those terms.

59. Furthermore, it should be noted that the purpose of the law in Homebush Flour Mills was to raise revenue: see at 412 per Dixon J. An objective of raising revenue is significant in discerning whether an exaction constitutes taxation: see Luton v Lessels (2002) 210 CLR 333 at [13] per Gleeson CJ, [120]-[121] per Kirby J and [177] per Callinan J. The impugned provisions in the present case cannot be said to have such a purpose as the amount of revenue to be generated for the Commonwealth will be identical irrespective of whether the Plaintiff chooses to pay notional GST (in which case the Commonwealth will receive the amount of notional GST) or chooses not to pay notional GST (in which case, assuming the conditions will be complied with by NSW, the Commonwealth will receive a payment corresponding to the amount of unpaid notional GST).

Conclusion

60. For the reasons set out above, the first and second questions of law stated for the opinion of the Full Court should be answered in the negative as none of the impugned provisions, on their own or in combination, impose a tax on property of the Plaintiff. No relief should be granted to the Plaintiff in respect of the payment under protest of notional GST with respect to the sale of the Plaintiff's vehicle on 24 May 2022. The Plaintiff should pay the costs of the special case.

Part VI: TIME FOR ORAL ARGUMENT

61. NSW will require up to one hour for oral submissions.

Dated 28 November 2022

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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

ANNEXURE TO THE SECOND DEFENDANT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the Second Defendants sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in the submissions

	Description	Version	Provision
	Constitutional provisions		
1.	Constitution	Current	ss. 55, 96, 114
	Statutes		
2.	*A New Tax System (Goods and Services Tax) Act 1999* (Cth)	Current (Compilation No. 89, 22 June 2022 – present)	ss. 1-4, 3-1, 3-5, 5, 7-1, 9-5, 9-10, 9-40, 173-1, 177-1, 195-1
3.	*A New Tax System (Goods and Services Tax Imposition—General) Act 1999* (Cth)	Current (1 July 2005 – present)	ss. 3, 4, 5
4.	*A New Tax System (Goods and Services Tax Imposition—Customs) Act 1999* (Cth)	Current (1 July 2005 – present)	s. 5
5.	*A New Tax System (Goods and Services Tax Imposition—Excise) Act 1999* (Cth)	Current (1 July 2005 – present)	s. 5
6.	*Federal Financial Relations Act 2009* (Cth)	Current (Compilation No. 11, 1 October 2020 – present)	ss. 5, 6, 22

7.	*Income Tax Assessment Act 1997* (Cth)	Current (Compilation No. 237, 14 October 2022 – present)	s. 995-1
8.	*Intergovernmental Agreement Implementation (GST) Act 2000* (NSW)	Current (6 July 2004 – present)	Long Title, ss. 3, 4, 5, Sch. 1
9.	*Local Government Act 1993* (NSW)	Current (16 June 2022 – present)	ss. 429, 430, 438L, 438M, 438U, 438Y
10.	*Local Government (Financial Assistance) Act 1995* (Cth)	Current (Compilation No. 8, 10 March 2016 – present)	ss. 3, 6, 9, 11, 12, 14, 15
11.	*Local Government (Financial Assistance) Amendment Act 2000* (Cth)	As made	