HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S202 of 2021

BETWEEN:

HORNSBY SHIRE COUNCIL
Plaintiff

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and

COMMONWEALTH OF AUSTRALIA
First Defendant

and

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THE STATE OF NEW SOUTH WALES
Second Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

PART I: PUBLICATION

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

PART II: INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: LEAVE TO INTERVENE

3. Not applicable.

PART IV: ARGUMENT

4. South Australia adopts the submissions of the Commonwealth and New South Wales
10 in answer to the questions posed at [68(1)-(2)] of the Special Case. If this Court accepts those submissions, then the question posed at [68(3)] of the Special Case, concerning relief, will not fall to be determined. South Australia makes the following submissions concerning relief should it become necessary for the Court to consider that question.

5. The Plaintiff claims that it is entitled to restitution on three alternative bases:

   (a) it has a "*constitutional right*" to restitution, on the basis of the decision of the Supreme Court of Canada in *Kingstreet Investments v New Brunswick* [2007] 1 SCR 3 ('*Kingstreet*');

   (b) money paid pursuant to an invalid tax is prima facie recoverable as of right, on the
20 basis of the decision of the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 ('*Woolwich*'); or

   (c) on more general notions of money had and received, namely principles of duress and *colore officii*.

6. In response, South Australia submits that:

   (a) the *Commonwealth Constitution* does not contain any express or implied right to restitution of invalid tax; and

   (b) it is unnecessary for the *Woolwich* principle to be adopted in Australia because the existing common law of restitution is sufficient to facilitate the recovery of invalid taxes that would otherwise amount to unjust enrichment.

No constitutional right to restitution

7. Relying upon the authority of the Supreme Court of Canada in *Kingstreet*, the Plaintiff's primary contention is that its entitlement to restitution "*flow*[s] *from the infringement of the Constitution*."[1] That contention should be rejected because, by contrast to the Canadian Constitution,[2] the *Constitution* does not create private causes of action or remedies enforceable by individuals.

8. The *Constitution* is principally "*concerned with the powers and functions of government and the restraints upon their exercise.*"[3] Subject to some narrow exceptions (that are immaterial for present purposes),[4] the *Constitution* is not the source of private rights enforceable against government or between citizens.[5] The *Constitution* itself does not create private causes of action or provide constitutional remedies.[6] Rather, where government acts in breach of the *Constitution* it may expose itself to causes of action available under the general law.[7] Just as actions in tort and breach of contract do not "*flow from the infringement of the Constitution*", nor do claims in restitution.[8]

9. In substance, the Plaintiff's submission amounts to an invitation to imply into the *Constitution* a right to restitution. The Plaintiff draws, not upon the *text and structure*

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1 Plaintiff's Submissions, p 18 [62].

2 Comprising the *Constitution Act 1982* (Can) and the various pre-confederation instruments referred to in its schedule, as well as various unwritten conventions.

3 *James v Commonwealth* (1939) 62 CLR 339, 362 (Dixon CJ) ('*James*').

4 First Defendant's Submissions, p 19 [58], fn 70.

5 *Nationwide News Ltd v Wills* (1992) 177 CLR 1, 46-53 (Brennan J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 147-149 (Brennan J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560-566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Levy v Victoria* (1997) 189 CLR 579, 606 (Dawson J), 620 (McHugh J), 628 (Kirby J); *Kruger v Commonwealth* (1997) 190 CLR 1, 46 (Brennan CJ) ('*Kruger*').

6 *James* (1939) 62 CLR 339, 362 (Dixon J); *McClintock v Commonwealth* (1947) 75 CLR 1, 19 (Latham CJ); *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 99 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ) ('*Antill*'); *Northern Territory v Mengel* (1995) 185 CLR 307, 350-353 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), 372-373 (Deane J); *Kruger* (1997) 190 CLR 1, 46 (Brennan CJ), 93 (Toohey J); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 52-53 [40]-[42] (McHugh, Gummow and Hayne JJ), 89 [168] (Callinan J), cf 77-81 [127]-[137] (Kirby J) ('*BAT*'); *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, 555-556 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

7 *Kruger* (1997) 190 CLR 1, 46 (Brennan CJ). See also *Antill* (1955) 93 CLR 83, 99 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ), quoting *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497: "*It is true, as has been said more than once in the High Court, that s 92 does not create any new juristic rights, but it does give the citizen of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call on the judicial power to help him to resist, legislative or executive action which offends against the section. The plaintiff's cause of action is in this sense the consequence of s 92, although it is given by the common law.*"

8 *Kruger* (1997) 190 CLR 1, 46 (Brennan CJ); *BAT* (2003) 217 CLR 30, 52 [40] (McHugh, Gummow and Hayne JJ).

of the *Constitution*, but rather, from a *principle*, "*no taxation without representation*".[9] Whilst, of course, South Australia accepts that parliamentary control over the extraction and expenditure of public moneys is "*central to the idea of responsible government*",[10] it does not follow that any breach of these principles should give rise to a constitutional cause of action standing apart from the remedies available under the general law. This submission draws support from the recent decision in *Sims v Commonwealth* which rejected the necessity to anchor the *Auckland Harbour Board*[11] principle by way of constitutional implication.[12]

10. The constitutional setting in which *Kingstreet* was decided is readily distinguishable. The *Constitution Act 1982* (Can) expressly provides for a number of personal rights and freedoms of Canadian citizens.[13] Within that constitutional context, the Supreme Court of Canada has come to recognise the existence of 'constitutional' causes of action and remedies to enforce those rights.[14]

Adoption of the '*Woolwich* principle' unnecessary

11. The '*Woolwich* principle' extends the existing law of restitution to allow recovery of money paid to a public authority in the form of taxes or other levies pursuant to an ultra vires demand as of right, by reference only to the fact that the authorising law was invalid.[15] This Court has not recognised the *Woolwich* principle.[16]

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[9] Plaintiff's Submissions, p 17-18 [60]-[62].

[10] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 37-38 [58] (French CJ). See also *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 433-443 (Isaacs J); *New South Wales v Bardolph* (1934) 52 CLR 455, 468-473 (Evatt J), 496-497 (Rich J), 501-502 (Starke J), 508-510, 514 (Dixon J, Gavan Duffy CJ agreeing), 526-530 (McTiernan J); *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 465-468 (McHugh and Gummow JJ).

[11] *Auckland Harbour Board v the King* [1924] AC 318, 326-327 (Viscount Haldane).

[12] *Sims v Commonwealth* [2022] NSWCA 194, [79]-[80], [94]-[95] (Bell CJ), [118]-[119] (Meagher JA), [153] (White JA).

[13] The rights recognised in the *Constitution Act 1982* (Can) include, but are not limited to, those enumerated in the Canadian *Charter of Rights and Freedoms* which is set out at Part I to that Act.

[14] The *Constitution Act 1982* (Can), Pt I, s 24(1) expressly provides: "*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*" See, for example, *Vancouver (City) v Ward* [2010] 2 SCR 28, where the Supreme Court of Canada accepted that s 24(1) of the *Constitution Act* contemplates a damages claim similar to the '*Bivens* claim' recognised by the United States Supreme Court in *Bivens v Six Unknown Agents of the Federal Bureau of Narcotics* 403 US 388 (1971).

[15] *Woolwich* [1993] AC 70, 177 (Lord Goff of Chieveley).

[16] Various lower courts have recognised that adoption of *Woolwich* would be to take a liberal approach to the law of restitution and would see a significant extension of common law remedies recognised in Australia: *Chippendale v Commissioner of Taxation* (1996) 62 FCR 347, 366[C] (Lehane J); *SCI Operations Pty Ltd v Commonwealth* (1996) 69 FCR 346, 378[D] (Sackville J) (overturned on other grounds, (1998) 192 CLR 285). Cf *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, [145]-[148] (Murphy J).

12. It is unnecessary for this Court to adopt *Woolwich* because the existing common law of restitution provides sufficient recourse for recovery of invalid tax in appropriate circumstances. Absent adoption of *Woolwich*, a taxpayer might claim restitution of invalid tax on one of several established bases:

(a) *Mistake of fact or law*. Although historically thought to be insufficient to ground a claim for restitution,[17] it has now been authoritatively determined that a right to restitution extends to circumstances of mistake of law.[18] Restitution is now available on the basis that the mistake renders the relevant transaction different from that which the parties intended and is, in that sense, involuntary. Involuntariness of the transaction is the established 'unjust factor'.[19]

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(b) *Improper pressure*. Improper pressure may take several forms, including duress,[20] and payments resulting from demands made *colore officii*.[21] The principles may also apply under colour of a statute which imposes an invalid tax and contains superadded provisions which attach consequences to non-payment (beyond a liability to be sued),[22] at least where there is actual evidence of a threat or coercion.[23] The unifying 'unjust factor' is that the right to restitution flows from the involuntariness of the transaction, in the sense that payment is not freely made.

(c) *Failure of consideration*.[24] Failure of consideration is not limited to non-performance of a contractual obligation, but embraces payment for a purpose which has failed.[25] Whereas mistake and improper pressure look to the

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17 *J&S Holdings v NRMA Insurance Pty Ltd* (1982) 61 FLR 108, 123 (Blackburn, Deane and Ellicott JJ).

18 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 376-379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) ('*David Securities*'). The decision in *David Securities* post-dated *Woolwich* by some three months.

19 *David Securities* (1992) 175 CLR 353, 372-374, 378 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

20 *Mason v New South Wales* (1952) 102 CLR 108 ('*Mason*').

21 *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 276-277 (O'Connor J).

22 *Mason* (1952) 102 CLR 108, 126 (Kitto J). See also the conclusion of Dixon CJ, at 117, that a right to restitution arose on the basis of the mere existence of enforcement provisions in the *State Transport (Co-ordination) Act 1931* (NSW).

23 *Mason* (1952) 102 CLR 108, 123-124 (Fullagar J) 129-130 (Taylor J), 134-135 (Menzies J), 143-144 (Windeyer J). Notwithstanding the narrow view taken of the legal principle, each of Fullagar, Taylor, Menzies and Windeyer JJ held that duress was present on the facts, despite scant evidence beyond the mere fact that the Act was being administered in its usual course. In this respect, the additional requirement goes little further than the reasoning of Kitto J that improper pressure may be identified by reference to the statute itself.

24 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 ('*Roxborough*'); *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

25 *Roxborough* (2001) 208 CLR 516, 525 [16] (Gleeson CJ, Gaudron and Hayne JJ).

voluntariness of the transaction, the 'unjust factor' lies in the retention of payment for which no consideration was received.[26]

13. *Woolwich* adds little to the existing common law grounds for restitution with respect to recovery of invalid tax. As Chief Justice Mason observed in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd*, many of the situations to which *Woolwich* might have had application have now been subsumed by the extension of the law of restitution to embrace error of law.[27] Likewise, the broader notion of duress favoured by Chief Justice Dixon and Justice Kitto in *Mason v New South Wales* may come to facilitate a remedy where superadded consequences for non-payment satisfy
10 the 'unjust factor' of involuntariness. Indeed, applying that analysis to the facts of *Woolwich* would likely have afforded a right to restitution without any need to "*invent a new cause of action*".[28]

14. An entitlement to restitution depends upon the existence of a qualifying or vitiating 'unjust factor' falling into some particular category.[29] Although the categories are not closed,[30] new cases should be identified incrementally and by analogy.[31] The reasoning of Lord Goff in *Woolwich* did not conform to this method. Some of the payments encompassed by Lord Goff's principle may have been vitiated by injustice, but others were not. His Lordship's conclusion, influenced by policy motivated factors,[32] identified a blanket rule applicable to government unmoored from the existing
20 authorities and the unifying principle of unjust enrichment.

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[26] *Foran v Wight* (1989) 168 CLR 385, 438 (Deane J); *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 375 (Deane and Dawson JJ).

[27] (1994) 182 CLR 51, 67-68 (Mason CJ).

[28] *Kruger* (1997) 190 CLR 1, 125-126 (Gaudron J). The statutory background to Woolwich's voluntary payment is summarised in the judgment of Ralph Gibson LJ in the Court of Appeal ([1993] AC 70, 105), namely: (i) Schedule 20 to the *Finance Act 1972* (UK), which provided for interest on overdue payments, (ii) s 61 of the *Taxes management Act 1970* (UK) which provided a power of distress on goods and chattels in the case of failure to pay a sum charged, (iii) ss 6 and 68 of same Act, which provided that tax may be recovered as a debt due to the Crown, and (iv) s 98 of the same Act which provided that a penalty not exceeding £50 may be imposed on a taxpayer who fails to make a return and for greater penalties if that failure is fraudulent or negligent.

[29] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ); *David Securities* (1992) 175 CLR 353, 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

[30] *Lactos Fresh Pty Ltd v Finishing Services Pty Ltd (No 2)* [2006] FCA 748, [92] (Weinberg J).

[31] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256-257 (Deane J); *David Securities* (1992) 175 CLR 353, 378-379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis, 4th ed., 2021), 82-83 [168], referred to with approval in *Wasada Pty Ltd v State Rail Authority of New South Wales (No 2)* [2003] NSWSC 987, [16]-[17] (Campbell J).

[32] *Woolwich* [1993] AC 70, 172: "*Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to require that the tax be repaid, unless special circumstances or some principle of policy require otherwise*".

15. For these reasons, the rule identified in *Woolwich* should not be adopted in Australia. The existing common law of restitution should, to the extent necessary, mould itself to provide a remedy where the requisite unjust factor is found to be present on a case-by-case basis.

PART V: TIME ESTIMATE

16. It is estimated that 15 minutes will be required for the presentation of South Australia's oral argument.

Dated: 12 December 2022

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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

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THE STATE OF NEW SOUTH WALES
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ANNEXURE

20 **PROVISIONS REFERRED TO IN THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)**

No.	Description	Date in Force	Provision
Constitutional Provisions			
1.	*Commonwealth Constitution*	Current	55, 81, 96, 114
Statutes			
2.	*Constitution Act 1982* (Can)	Current	Pt1, s 24
3.	*State Transport (Co-ordination) Act 1931* (NSW)	27 / 02 / 1959	Whole
4.	*Finance Act 1972* (UK)	20 / 07 / 1992	Sch 2
5.	*Taxes management Act 1970* (UK)	20 / 07 / 1992	6, 61, 68, 98