HIGH COURT OF AUSTRALIA

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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

B E T W E E N:

HORNSBY SHIRE COUNCIL
Plaintiff

COMMONWEALTH OF AUSTRALIA
First Defendant

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AND

STATE OF NEW SOUTH WALES
Second Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

20 **PART II: BASIS OF INTERVENTION**

2. The Attorney General for Western Australia intervenes pursuant to s.78A of the *Judiciary Act 1903* (Cth) in support of the orders sought by the defendants.

PART III: ARGUMENT

TAXATION SCHEME FOR NOTIONAL GST PAYABLE BY THE PLAINTIFF

3. Section 114 of the *Commonwealth Constitution* ("***Constitution***") provides intergovernmental immunity for one level of government from taxation on its property by another level of government. It provides that the Commonwealth shall not impose any tax on property of any kind belonging to a State. Conversely, s.114 also provides that a State shall not impose a tax on any property of any kind,
30 belonging to the Commonwealth.

4. The plaintiff is a local council, which the parties have agreed is within the meaning of "State" for the purposes of the immunity from Commonwealth taxation contained in s.114 of the *Constitution*.[1]

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[1] Special Case Book ("**SCB**") at 127 [49(c)]. See in particular *Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219, 229-233 (the Court).

5. The Commonwealth legislation imposing the Goods and Services Tax (**GST**) throughout Australia specifically provides that it does not impose a tax on "property of any kind belonging to a State", as that term is defined in s.114.[2]

6. However, as in other States, there is a scheme for local governments in NSW to pay "notional GST" to the Commonwealth Commissioner of Taxation. This scheme depends upon a suite of legislation contained in three statutes. These are the *Local Government (Financial Assistance) Act 1995* (Cth) ("***Local Government Financial Assistance Act***"), the *Federal Financial Relations Act 2009* (Cth) ("***Federal Financial Relations Act***") and the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) ("***NSW Implementation Act***").

7. The scheme consists of the following elements:

   (a) the Commonwealth makes grants pursuant to s.96 of the *Constitution* to State Governments for "financial assistance for local government purposes": s.12 of the *Local Government Financial Assistance Act*;

   (b) the payment of those grants is "tied", or subject, to a condition set out in s.15(aa) of the *Local Government Financial Assistance Act*, which was introduced by items 16, 17 and 18 of Sch 1 to the *Local Government (Financial Assistance) Amendment Act 2000* (Cth). That provision provides:

   > "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";[3]

   (c) the *Local Government Financial Assistance Act* also provides that the amount of any grants allocated to States shall be determined without taking into account the possible operation of s.15(aa): see ss.6(8), 11(3), 14(3). In other words, grants shall be allocated upon the assumption that State entities (including local governments) pay GST;

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2 See s.5 of each of the following: *A New Tax System (Goods and Services Tax Imposition – General) Act 1999* (Cth); *A New Tax System (Goods and Services Tax Imposition – Customs) Act 1999* (Cth); *A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999* (Cth).

3 The constitutional validity of those provisions is raised by question 1 in the Special Case. In other words, question 1 of the Special Case raises the issue of the constitutional validity of s.15(aa) of the *Local Government Financial Assistance Act*.

(d) there is an agreement between the Commonwealth and each State, for the purposes of s.15(aa). This was initially contained in clauses 17 and 18 of the 1999 Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations ("**1999 Agreement**").[4] The 1999 Agreement has been included as a schedule to the *NSW Implementation Act*, which provides that it is the intention of the State of NSW to comply with, and give effect to, the 1999 Agreement;[5] and that a State entity[6] "may pay" to the Commissioner of Taxation amounts "that would have been payable" if not for s.114 of the *Constitution*;[7] and

(e) for the purposes of calculating the amount of GST Revenue available for making Commonwealth grants, s.6(3)(a)(ii) of the *Federal Financial Relations Act* provides that the amount shall include:

> "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";

and s.6(3)(c) provides that the GST Revenue shall also include:

> "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."

PLAINTIFF'S CLAIMS

8. Questions 1 and 2 in the Special Case depend upon whether the plaintiff was subject to any statutory provision or provisions which, separately or in combination, impose a tax upon the plaintiff. If s.15(aa) of the *Local Government Financial Assistance Act* is not such a provision, that Act did not need to be passed in accordance with s.55 of the *Constitution*. Equally, if there are no such provisions

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4 SCB at 121 [14]-[17] and 158.
5 See *NSW Implementation Act* s.4.
6 Which is defined in s.3 to include a person who be liable to pay GST if not for s.114 of the *Constitution*.
7 *NSW Implementation Act* s.5. Clause 17 of the 1999 Agreement has now been replaced by clause A28 of the 2009 Intergovernmental Agreement of Federal Financial Relations ("**2009 Agreement**"): SCB at 248. There was no need to include the equivalent of clause 18 in the 2009 Agreement, as the relevant legislation had been enacted by 2009.

in the legislative scheme for payment of "notional GST" by the plaintiff, contained in the *Local Government Financial Assistance Act*, the *Federal Financial Relations Act* and/or the *NSW Implementation Act*, then this scheme does not impose a tax contrary to s.114 of the *Constitution*.

9. The Attorney General of Western Australia supports the submissions made by the defendants that there is no tax upon the plaintiff or its property imposed by either the *Local Government Financial Assistance Act* or the whole suite of legislation. It supplements these submissions below.

10. The Attorney General of WA does not make separate submissions on Question 3 in the Special Case, save to make one short observation. That is, the *Constitution* primarily concerns the relationship between different institutions of government. It does not typically create personal rights, apart from some well-acknowledged exceptions (eg s.117). There is no textual or contextual basis for suggesting that a taxpayer has a personal right simply to recover the amount of tax paid pursuant to provisions which are later declared to be unconstitutional. The taxpayer should be required to fit any claim within a recognised basis for recovery, such as making a claim for restitution in unjust enrichment.

NO TAX FOR PURPOSES OF SECTIONS 55 OR 114 OF THE CONSTITUTION

The Plaintiff's Methodology and the Circuitous Device Submission

11. The plaintiff's written submissions largely frame the constitutional challenge by focusing upon s.15(aa) of the *Financial Assistance Act*, and by maintaining that it imposes a tax contrary to s.114 of the *Constitution*. Thus, the plaintiff says that s.15(aa) "is the principal provision that imposes a tax on the plaintiff's property in contravention of the prohibition in s 114";[8] and the plaintiff does not mention s.55 of the *Constitution* except tangentially and at the end of its written submissions.[9]

12. The priority given to s.15(aa) means that unless this provision operates by itself or in combination with other provisions to impose a tax on the plaintiff, the case fails.

13. By its terms, s.15(aa) does not use words which create a legal liability of the plaintiff to pay any amount or which impose any legal obligation or duty upon the

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8 Plaintiff's Submissions (**PS**) at [39]. See also at [44].
9 PS at [57]-[58].

plaintiff to pay any amount. Instead, the plaintiff maintains that it "imposes [a] tax" because it subjects the plaintiff to various compulsory mechanisms (both legal and practical) or forced benevolence to make a payment; or uses a circuitous device to extract a payment from the plaintiff.[10]

14. This leads to a further point. The emphasis upon s.114 has a particular consequence. It means that the plaintiff first develops a contention about whether "notional GST", imposed by way of a tied grant pursuant to s.96, may ever be regarded as circumventing the constitutional restriction in s.114 against the Commonwealth taxing State property.[11] Having concluded that it may be unconstitutional for a condition of a tied grant to be (in substance) contrary to s.114, the plaintiff turns to the more fundamental question of whether the condition of the tied grant in this case may be characterised as imposing a tax.[12]

15. The plaintiff then returns to the question of evading s.114 when making written submissions about the existence of a tax.[13] At this point, the plaintiff submits that there is a tax simply because a condition of the tied grant requires notional GST to be imposed against a local government. This is said to be because the condition represents a "circuitous device" to evade the operation of s.114. For example, the plaintiff submits that: "[i]nsofar as notional GST is a tax imposed by way of a forced benevolence or through a circuitous device, it is a tax imposed by the Commonwealth."[14] Similarly, the plaintiff also submits that: "If, in combination, the legislative regime as part of a circuitous device constitutes a tax …".[15]

16. These submissions involve teleological reasoning. They amount to the assertion that the end result of the legislative scheme here has the same effect as imposing a tax on property; therefore the effect of the legislative scheme indicates that a tax must have been imposed and the legislative scheme must be prohibited by s.114. There is no separate evaluation (for the purposes of the circuitous device submissions) of whether the scheme actually imposes a tax on property, according to objective criteria.

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10 PS at [38]-[56].
11 PS at [14]-[33].
12 PS at [33].
13 PS at [48]-[56].
14 PS at [56] (underlining added).
15 PS at [58].

17. The fallacy in such reasoning is that an end result may be achieved by two different legislative schemes, one which is valid and the other which is invalid. Here, the legislative scheme for notional GST uses tied State grants instead of imposing a tax on property. That is not a circuitous device to achieve a prohibited result. It is the use of legislative power which is not prohibited to achieve a result which might not have been reached had the legislative power been exercised in a different way (by attempting to tax the property of a local government). If the plaintiff cannot characterise the GST scheme as imposing a "tax", then there can be no circuitous device.

10 18. This very point is developed in relation to s.114 by Latham CJ in *Attorney-General (NSW) v Homebush Flour Mills Ltd* ("***Homebush***").[16] Further, the maxim that "you cannot do indirectly what you are forbidden to do directly" has been considered in other constitutional contexts. In these other contexts, it is relevant to consider whether a provision, or collection of provisions,[17] in the impugned law, in substance, contravenes a constitutional prohibition.[18] The term "circuitous device" has been used as a means of describing laws which in substance contravene a constitutional prohibition.[19]

19. In these other contexts, it is still necessary to establish that the relevant constitutional prohibition has been infringed, whether by the acquisition of
20 property contrary to s.51(xxxi),[20] the imposition of a duty of excise contrary to s.90,[21] or, as in the present case, the Commonwealth imposition of a tax on the property of a State contrary to s.114.

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16 *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 at 398 (Latham CJ) ("***Homebush***").

17 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 633-634 (Gummow J).

18 *Georgiadis v Australian & Overseas Telecommunications Corp* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ).

19 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J); *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510 (Mason CJ, Brennan, Deane and Gaudron JJ).

20 *JT International SA v Commonwealth* [2012] HCA 43; (2012) 250 CLR 1 at 67-68 [169] (Hayne and Bell JJ).

21 *Homebush* at 400 (Latham CJ).

20. However, these cases do not mean that if one thing which has a particular effect is constitutionally prohibited, then a further independent prohibition may be implied to prevent all things which have that same effect.[22]

21. Moreover, there is no case where an invalid "circuitous device" has involved a legislative scheme which utilises both State and Commonwealth legislation. That is for good reason. It is inconceivable that State legislation could cause otherwise valid Commonwealth statutory provisions to become invalid, because they are enacted as part of a so-called circuitous device.

22. For these reasons, the submissions on the existence of a circuitous device do not take the matter any further. The short point is that the plaintiff must prove that the GST scheme imposes a "tax" in order to succeed. For the reasons that follow, they have not made this out.

Imposition of a Tax – Direct Liability or Compulsory Mechanism

23. There is a distinction between legislation which imposes a legal liability or obligation upon a person, and legislation which utilises a compulsory mechanism (legal or practical) to compel a person to make a payment.[23] The former uses statutory words which directly impose a liability or obligation. The later prescribes consequences which follow if a payment is not made by a person.

24. The prescribed consequences may apply as a matter of law or may (possibly) apply as a matter of practicality. If the compulsory mechanism is practical, it will be necessary to show the practical effect of the mechanism as a matter of obvious inference or evidence.[24] There has been some doubt expressed as to whether "practical compulsion", as distinct from legal compulsion, may amount to taxation.[25]

25. Where legislation utilises a compulsory mechanism to compel a payment, that legislation may be characterised as imposing a tax if the compulsory mechanism

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22 *Container Terminals Australia Ltd v Xeras* (1991) 23 NSWLR 214 at 217 (Handley JA, with Samuels and Priestley JJA agreeing).
23 *Homebush* at 412 (Dixon J).
24 Compare *Homebush* at 418-419 (Evatt J).
25 *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 at 561 (Gibbs J, with Barwick CJ agreeing at 536 and 538, Stephens J agreeing at 563, Mason J agreeing at 564, Murphy J agreeing at 565, Wilson J agreeing at 571-572).

means that the consequence of non-payment makes that option "quite illusory",[26] or that a person "will naturally seek to avoid"[27] that consequence. Another way of describing the test is to ask whether the prescribed consequences leave no alternative "rational economic choice".[28]

26. Thus, in *Homebush*, the consequence of not voluntarily paying what was, in effect, a levy to re-purchase flour which the State had expropriated was that a flour miller would go out of business, because the miller could not sell the flour except as directed by the State. That was regarded as the imposition of a tax, because the necessary inference was that the non-payment option was quite illusory and naturally one which a miller would seek to avoid.[29]

27. *Homebush* is the only High Court authority which provides an example of a compulsory mechanism amounting to a tax.[30] The compulsive mechanism in that case was quite extraordinary, involving an expropriation of all product by the State and the consequence that a miller would go out of business unless the levy was paid.

No Compulsion and Forced Benevolence

28. The plaintiff does not submit that it is liable to pay a tax because it is subject to any direct liability or obligation to pay an amount to the Commissioner of Taxation. Instead, the plaintiff submits that the notional GST is a tax because it is subject to legal or practical compulsion to pay it.[31]

29. The substance of the plaintiff's submissions about compulsion have been addressed in detail by the defendants, all of which the Attorney General of WA adopts. The concepts of compulsion and forced benevolence are essentially the same.[32]

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26 *Homebush* at 399 (Latham CJ).
27 *Homebush* at 413 (Dixon J).
28 *Australian Capital Territory v Queanbeyan City Council* [2010] FCAFC 124; (2010) 188 FCR 541 at 561 [76] (Keane CJ).
29 See also *Homebush* at 399-400 (Latham CJ), 405 (Rich J), 408 (Starke J), 412-413 (Dixon J), 417 (Evatt J), 421 (McTiernan J).
30 There is one other lower court example, but the finding was not decisive in that case, as the charge was fee for service and not a tax in any event: *Knight v Secretary, Department of Justice* [2012] VSC 613. There is also some discussion about forced benevolence and taxation by Isaacs J in *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 444-445, but he was only one member of the Court and the discussion relates to a different form of arrangement where there is an alleged agreement to mask a compulsory payment.
31 PS at [37].
32 See the way Latham CJ treated these matters in *Homebush* at 400.

30. The question is whether s.15(aa) of the *Local Government Financial Assistance Act,* either by itself or as part of a suite of legislation, creates an "illusory option" for the plaintiff to pay notional GST; or whether it creates a consequence for not paying notional GST which the plaintiff will "naturally seek to avoid"; or whether there is no "rational economic choice" other than to pay the notional GST.

31. The answer to that question is obvious, when the alternatives are considered. On the one hand, the plaintiff can itself pay notional GST. On the other hand, the plaintiff can receive funding which is reduced by the amount of notional GST it should have paid. So, from the plaintiff's perspective, the two choices are revenue neutral. Implicitly, the plaintiff seeks to maintain the same level of funding, but to avoid paying the notional GST. However, nothing compels the Commonwealth to provide funding of a particular amount.

32. In that context, none of the four matters mentioned by the plaintiff[33] demonstrate that it is compelled to pay the notional GST:

    (a) the submission that the "Commonwealth must receive from the plaintiff an amount equivalent to the notional GST"[34] is without foundation. Nothing in the legislative scheme requires that the amount of notional GST must be received "from the plaintiff";

    (b) it is submitted that "[i]f amounts from the grants to the plaintiff are withheld from it, the plaintiff's ability to fund capital and operating projects … would be compromised".[35] However, either the plaintiff pays an amount equal to the GST or it has an equivalent amount withheld. That is revenue neutral;

    (c) there is no evidence or basis for the claim that there would be adverse action taken against the plaintiff by the NSW Office of Local Government;[36] and

    (d) the words in s.15(aa) of the *Local Government Financial Assistance Act* that a payment is one which "should, but have not, been paid by local governing bodies" do not connote any legal obligation upon the plaintiff. They relate to an obligation upon the State (as a separate polity from "local governing bodies") to withhold an amount and pay it to the Commonwealth and are to be

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33 PS at [38(b)-(e)].
34 PS at [38(b)] (underlining added).
35 PS at [38(c)].
36 PS at [38](d)].

contrasted with the reference to "voluntary GST payments" by "local governing bodies"[37].

33. The plaintiff also refers to two other matters in the context of its claim that it is subject to compulsion or forced benevolence, but again these matters do not assist:

(a) the plaintiff seeks to draw an inapt analogy between the requirement for States to withhold and remit funds pursuant to s.15(aa) and the obligation on employers to withhold income tax.[38] Employer deductions relate to the tax liabilities of employees (rather than voluntary payments). In any event, provisions which impose a responsibility to collect and remit a tax do not impose a tax;[39]

(b) the principles explained in *Mallinson v Scottish Australian Investment Company Ltd* (1920) 28 CLR 66 ("***Mallinson***") do not provide any foundation for the submission that the plaintiff may be liable to pay the second defendant for amounts paid to the first defendant pursuant to s.15(c) of the *Financial Assistance Act*.[40] *Mallinson* concerned an application of the rule that "wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary".[41] The right to recover in *Mallinson* was a right to "receive from a designated person a liquidated sum of money".[42] The *Local Government Financial Assistance Act* does not create any duty or obligation on the plaintiff to pay the second defendant any amounts that the second defendant is required to pay under s.15(c).

34. For these reasons, there is no compulsory tax imposed on the plaintiff to pay the amount of notional GST, and questions 1 and 2 should be answered in line with the submissions of the defendants.

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37 PS at [38(e)].
38 PS at [47], citing *Deputy Commissioner of Taxation v Woodhams* [2000] HCA 10; (2000) 199 CLR 370 ("***Woodhams***").
39 *Woodhams* at 376 [13] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).
40 Cf PS at [39], [46].
41 *Mallinson v Scottish Australian Investment Company Ltd* (1920) 28 CLR 66 at 70 (Knox CJ) ("***Mallinson***").
42 *Mallinson* at 72 (Knox CJ).

PART IV: LENGTH OF ORAL ARGUMENT

35. It is estimated that the oral argument will take 15 minutes.

Dated: 9 December 2022

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ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Attorney General for Western Australia sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	Version	Provision
	Constitutional Provisions		
1.	*Commonwealth Constitution*	Current	ss.51(xxxi), 55, 90, 96, 114, 117
	Statutory Provisions		
2.	*A New Tax System (Goods and Services Tax Imposition – General) Act 1999* (Cth)	Current (Current 1 July 2005 – present)	s.5
3.	*A New Tax System (Goods and Services Tax Imposition – Customs) Act 1999* (Cth)	Current (1 July 2005 – present)	s.5
4.	*A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999* (Cth)	Current (1 July 2005 – present)	s.5
5.	*Federal Financial Relations Act 2009* (Cth)	Current (Compilation No. 11, 1 October 2020 – present)	s.6
6.	*Intergovernmental Agreement Implementation (GST) Act 2000* (NSW)	Current (6 July 2004 – present)	ss.3, 4, 5, Sch. 1
7.	*Judiciary Act 1903* (Cth)	Current (Compilation No. 49, 18	s.78A

		February 2022 – present)	
8.	*Local Government (Financial Assistance) Act 1995* (Cth)	Current (Compilation No. 8, 10 March 2016 – present)	ss.6, 11, 12, 14, 15
9.	*Local Government (Financial Assistance) Amendment Act 2000* (Cth)	As made	Sch. 1, items 16, 17, 18