



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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imposed by the Constitution”.<sup>3</sup> The same may be said of 51(xxxix).<sup>4</sup> Accordingly, as the financial power under s 96 to make grants on terms and conditions may underpin the legislative power of the Commonwealth,<sup>5</sup> the permissible terms and conditions are subject to constitutional prohibitions.<sup>6</sup> The Parliament cannot itself override the Constitution;<sup>7</sup> and “s.96 cannot be employed for the very purpose of nullifying constitutional guarantees contained elsewhere in the Constitution.”<sup>8</sup> Parliament’s power under s 96 to impose “such terms and conditions as the Parliament thinks fit” must, of necessity, be read as being subject to the s 114 prohibition; or, s 114 is robbed of its efficacy. To impose on grants (which are of longstanding relevance to financial relations between the States and the Commonwealth)<sup>9</sup> conditions proscribed by the Constitution would impermissibly expand the Commonwealth’s legislative power.

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5. *As to Cth [19(b)]*, the Commonwealth elides two different coercions. Even where a legislated grant may be voluntarily refused and thus not be coercive, the conditions of the grant may coerce payment of tax. The plurality in *ICM* who addressed the question there, indicated that the terms and conditions of a s 96 grant must conform to the limits of s 51(xxxi).<sup>10</sup> *As to Qld [12]*, the legislated exaction of notional GST under s 15(aa) of the *Local Government (Financial Assistance) Act 1995 (Cth) (Financial Assistance Act)* under a head of power other than s 51(ii)<sup>11</sup> does not preclude it from being a tax.<sup>12</sup>

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6. *As to Cth [15] and NSW [40]*, here, it is not the purpose of *the grant* that determines the invalidity of s 15(aa) or provides a constitutional constraint upon s 96. Rather, it is whether by imposing *the terms and conditions* of s 15, the Commonwealth has imposed a

<sup>3</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [8] (French CJ).

<sup>4</sup> See for instance, *Spence v Queensland* (2019) 268 CLR 355 at [53] per Kiefel CJ, Bell, Gageler & Keane JJ

<sup>5</sup> PS [23]-[33]; *Black* at 584 (Barwick CJ); at 593 (Gibbs J); *Moran*.

<sup>6</sup> *Black* at 576 (Barwick CJ) at 593, (Gibbs J), Aickin J agreeing (in the context of s 116); *ICM* at [36] and [45]-[46] per French CJ, Gummow and Crennan JJ (in the context of s.51(xxxi)).

<sup>7</sup> Constitution s 128.

<sup>8</sup> *Moran* at 801-802 (Evatt J).

<sup>9</sup> E.g. *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 at 204-205 [59] (French CJ).

<sup>10</sup> *ICM* at [31]-[46] (French CJ, Gummow and Crennan JJ); not addressed by Hayne, Kiefel and Bell JJ ([141]).

<sup>11</sup> “The Constitution creates a scheme, all the elements of which together make up the ‘taxing power’”. “The scheme includes ss 51(ii), 53, 54, 81, 90, 96, 99, 105A and 114 of the *Constitution*, as well as other provisions”: The Honourable Justice Michelle Gordon, “The Commonwealth’s Taxing Power and its Limits – Are We There Yet?” (2013) 36 Melbourne University Law Review 1038 at 1039-1040 and fn10.

<sup>12</sup> *Commonwealth and Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421 (payments made under agreements between the Commonwealth and the weaving company were held to be a tax levied without parliamentary consent); *Air Calédonie International v Commonwealth* (1988) 165 CLR 462 (the inclusion in the *Migration Act 1958* of a requirement for citizens to pay an immigration clearance fee when returning to Australia was held to be a tax and contra to s.55 of the Constitution); *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 (certain “royalty” provisions in the Copyright Acts were held to be a law with respect to copyrights within s.51(xviii) of the Constitution, but also held to impose a tax in contravention of s 55 of the Constitution).

tax.<sup>13</sup>

7. *As to Cth [10], last sentence of [18] (cf PS [16]),* the Commonwealth and NSW purporting to agree<sup>14</sup> to implement particular arrangements cannot override s 114. Further, the plaintiff was not party to the agreement.

**B) Legal or Practical compulsion**

8. *Contrary to Cth [37]-[43], NSW [43]-[46], Vic [18], WA [28]-[34], Qld [11],* there is legal compulsion here. Distinct legal duties are imposed on NSW by s 15(aa) to *withhold* from councils and, as a distinct obligation, to *pay* to the Commonwealth unpaid notional GST. These obligations, if valid, are not unenforceable surplusage. The Attorney General may enforce by injunction the obligation on NSW to *withhold* from a recalcitrant council, to achieve the public purpose of competitive neutrality.<sup>15</sup> Payment obligations under ss 15(aa) and 15(c) are enforceable; and see PS [39], [46].
9. If there is no legal compulsion, there is practical compulsion or forced benevolence. Forced benevolences, which the Petition of Right 1628<sup>16</sup> made unlawful, were compulsory exactions (taxes) notwithstanding an absence of legal compulsion.<sup>17</sup>
10. *As to Cth [47]-[48], NSW [57]-[58], Vic [23], [25],* although historical cases of forced benevolences have involved detriment larger than the benevolence, it does not follow that the detriment must be worse. The concept of ‘detriment’ constitutes the ‘absence of choice’ which makes it a compulsory exaction and therefore a tax.<sup>18</sup> Subsequent cases and commentary have taken *Homebush Flour Mills* to establish that an exaction is a forced benevolence if the ‘alternative’ left open by the legislature has pecuniary consequences.<sup>19</sup> This says nothing about the size of the detriment relative to the forced benevolence. It would, at least, include where the choice is to pay an amount or have it withheld.
11. *As to Cth [45], NSW [50], WA [31],* contrary to those submissions, the Court could not conclude or infer that the effect of the sanction in s 15(aa) is revenue neutral. The submissions ignore underlying issues such as commercial considerations on price setting and concepts of price elasticity of demand. The plaintiff’s decisions concerning price-

<sup>13</sup> *ICM* at [36] (French CJ, Gummow and Crennan JJ).

<sup>14</sup> *ICM* at [29] and decisions there cited (French CJ, Gummow and Crennan JJ).

<sup>15</sup> E.g. *Hobart International Airport v Clarence City Council* (2022) 96 ALJR 234 at [87]; *Ramsay v Aberfoyle Manufacturing Co (Aust)* [1936] ALR 6; *King v Gousssetis* (1986) 5 NSWLR 89 at 93A.

<sup>16</sup> The historical source of the ‘no tax without representation’ principle (PS [42], [60] and [62]).

<sup>17</sup> See too, *Cth* fn 56.

<sup>18</sup> *A-G (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 (*Homebush Flour Mills*).

<sup>19</sup> *Raza & Others v Chief Executive-in-Council & Others* [2005] 3 HKLRD 561 at [75]; Richard Jolly and Peter Ziegler, ‘Duties of excise and Queensland rail freight charges’ (1986) 14(3) *Australian Business Law Review* 193; H W Arndt, ‘Judicial review under section 90 of the Constitution: An economist’s view’ (1952) 25(11) *Australian Law Journal* 667.

setting do not make notional GST imposed by s 15(aa) any less compulsory. Further, the revenue neutrality and “windfall gain” assertions are premised on the constitutionality of s 15(aa) and should be rejected for that reason.

12. *As to Cth [2], [21], [48], NSW [48], [49], Vic [19]*, States will accept grants (as they have to date without exception) where, as here, the grant is legislated, of money and without onerous conditions or financial detriment to them. A forced benevolence is no less forced if prefaced by the inevitable acceptance of the grant by NSW as a stepping-stone.
13. Once NSW accepts the grant, the plaintiff is entitled to receive the whole of its allocation (Financial Assistance Act s 11) without excision of GST, without undue delay (s 15(a)(i)); subject only to an invalid condition that should not restrict payment. The full amount of the plaintiff’s allocation is due, as it was before s 15(aa) existed. *Contrary to Cth [18], Qld [5], [10], Vic [19]*, councils are entitled to the grant, without netting for underpayments of GST. The grant is set according to statutory criteria. Even if the failure, or not, by a recalcitrant council to have paid GST in a prior year, is the final criterion, it is a void criterion. Irrespective of entitlement, the Commonwealth cannot set a condition on the grant that contravenes the Constitution.
14. *As to Cth [22] and NSW [49a]*, notwithstanding that the grants are made to NSW, given the purpose of s 9 grants, on no view does NSW have an entitlement to keep or treat as its own such grants: see, e.g., ss 3(2), 3(3), 6(1), 9(1), 11(2) and 15(a)(i) of the Financial Assistance Act.

**C) The nature and effect of the circuitous device and the indicia of a tax**

15. *As to NSW [39], WA [16]-[17]*, the plaintiff’s alternative characterisation of the legislative regime as a circuitous device does not avoid identifying the impost. The plaintiff’s primary submission is that the impost is found in s 15(aa) (PS [2]). At a minimum, s 15(aa) is integral to a scheme, the effect of which subverts s 114 by imposing a tax on property of a State. The scheme (PS [5] to [12]) itself imposes the tax.
16. *As to Vic [28]-[29]*, steps which are otherwise lawful may be void if their effect is to contravene a constitutional prohibition.
17. *Contrary to WA [16]-[17]*, as the question of whether something is a tax depends on satisfying well recognised criteria, it is apposite to consider the effect of the scheme to see whether each criterion is, in fact, satisfied. A forced benevolence would offer the quintessential example where the effect was what created the tax.
18. *A fortiori*, here, the object of the scheme is said to be competitive neutrality, effected by requiring councils to pay amounts equal to tax (in the same way as other persons in the

market, who pay GST). The scheme undermines the tax relief provided by s 114.

**D) Other matters**

19. *As to Cth [29], [54]; NSW [59]*, notional GST is simply revenue raising. The money raised or received passes into the Consolidated Revenue.<sup>20</sup> In any event, a tax need not be revenue raising. A tax can be revenue neutral or for a purpose other than generating revenue.<sup>21</sup> It is, here, undoubtedly for a public purpose.

20. *As to Cth [33], [38], [55], [62]; NSW [51], [54]-[56]; Vic [6], [18]*, without accepting the correctness of *Landcom v Commissioner of Taxation* (2022) 114 ATR 639, that decision is of no real utility here given that the constitutionality of notional GST was not there argued.<sup>22</sup>

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**E) The plaintiff is entitled to restitution as relief**

21. *As to Cth [60]-[63], WA [10], Vic [36]-[37], SA [12]-[15]*, on the basis that notional GST has been paid pursuant to an invalid “tax” and paid under protest and where the claim is well within time, no cogent reason is offered against restitution being available with interest being granted in this special case, on established general law principles. Even assuming objection rights under Part IVC of the *Taxation Administration Act 1953* (Cth) (**TAA**) are available, it is not a bar to granting restitution. That said, there are good reasons for this Court to adopt the *Kingstreet* or *Woolwich* approaches (PS [59]): the Commonwealth cannot keep that to which it is not entitled (Cth [59]).

20 **Length of oral argument**

22. The plaintiff estimates that oral argument will take 3.5 hours.

**Dated:** 10 February 2023



**Rashelle Seiden**  
Ground Floor Wentworth Chambers  
Ph 02 9230 3220  
[rseiden@wentworthchambers.com.au](mailto:rseiden@wentworthchambers.com.au)



**Mark Robinson**  
Macquarie Street Chambers  
Ph 02 9221 5701  
[mark@robinson.com.au](mailto:mark@robinson.com.au)

<sup>20</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

<sup>21</sup> *Roy Morgan Research Pty v Commissioner of Taxation* (2011) 244 CLR 97 at [16], [48] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Northern Suburbs Cemetery Reserve Trust v Cth* (1993) 176 CLR 555 at 569, 589; *Radio Corporation Pty Ltd v Cth* (1938) 59 CLR 170, 179-80 (Latham CJ).

<sup>22</sup> *Landcom v Commissioner of Taxation* (2022) 114 ATR 639 at [131]-[132].



**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 PLAINTIFF'S REPLY**

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the plaintiff sets out below a list of the particular constitutional provisions and statutes referred to in its submissions and reply.

	<b>Commonwealth</b>	<b>Version(s)</b>	<b>Provision(s)</b>
1.	<i>Commonwealth of Australia Constitution Act</i>	Current (Compilation No.6, 29 July 1977 – present)	51(ii), 51(xiii), 51(xiv), 51(xviii), 51(xxiiiA), 51(xxxi), 51(xxxvi), 51(xxxix), 55, 75, 76, 81, 90, 92, 96, 99, 100, 114, 116
2.	<i>A New Tax System (Goods and Services Tax) Act 1999</i>	Current (Compilation No.89, 22 June 2022 to present)	7-1, 7-5, 7-15, 9-5, 9-10, 9-40, 17-5, 31- 5, 31-25, 33-5, 33- 10, 35-5
3.	<i>A New Tax System (Goods and Services Tax Imposition – Customs) Act 1999</i>	No.73, 1999 (as made). Current (1 July 2005 - present).	3, 5
4.	<i>A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999</i>	No. 74, 1999 (as made). Current (1 July 2005 - present)	3, 5
5.	<i>A New Tax System (Goods and Services Tax Imposition – General) Act 1999</i>	No. 75, 1999 (as made). Current (1 July 2005 - present)	3, 5
6.	<i>Acts Interpretation Act 1901</i>	Current (Compilation No.36, 20 December 2018 - present)	15A

7.	<i>Federal Court of Australia Act 1976</i>	Current (Compilation No.56, 18 February 2022 – present)	51A
8.	<i>Federal Financial Relations Act 2009</i>	Current (Compilation No.11, 1 October 2020 – present)	6
9.	<i>Judiciary Act 1903</i>	Current (Compilation No. 49, 18 February 2022 - present)	44, 77MA, 78B
10.	<i>Local Government (Financial Assistance) Act 1995</i>	Current (Compilation No.8, 10 March 2016 – present)	3, 6, 9, 11, 14, 15
11.	<i>Local Government (Financial Assistance) Amendment Act 2000</i>	No.71, 2000 (as made).	Sch 1 (Items 16, 17 and 18)
12.	<i>Taxation Administration Act 1953</i>	Compilation No. 192, 22 June 2022 to 9 August 2022.	Sch 1: 155-15, 250- 10, 255-5, 350-10
<b>State</b>		<b>Version</b>	<b>Provision(s)</b>
13.	<i>Intergovernmental Agreement Implementation (GST) Act 2000 (NSW)</i>	Current (from 6 July 2004 to present)	4, 5, Sch 1
14.	<i>Local Government Act 1993 (NSW)</i>	1 January 2002 to 15 June 2022	220, 429, 430, 438I, 438M, 438Y, 438U
<b>Other</b>			
15.	<i>An Act to free the Subjects from Benevolence, Statute II of 1484 (Eng)</i>		
16.	<i>Petition of Right, 1628 (Eng)</i>		