HIGH COURT OF AUSTRALIA

14 June 2023

HORNSBY SHIRE COUNCIL v COMMONWEALTH OF AUSTRALIA & ANOR
[2023] HCA 19

Today, the High Court answered questions stated in a special case. The principal issue was whether the scheme for the payment of "notional GST" by local government bodies in New South Wales ("NSW") – and, in the event of non-payment, the arrangement for the withholding of equivalent amounts from financial grants to those bodies – involved the imposition of a tax on property belonging to a State, contrary to s 114 of the *Constitution*.

In 1999, the Commonwealth and all States and Territories entered into an Intergovernmental Agreement pursuant to which the parties intended that the Commonwealth, States, Territories and local governments would operate as if they were subject to GST legislation, and would make voluntary or notional payments where necessary ("notional GST"), notwithstanding the prohibition in s 114 of the *Constitution* against the Commonwealth imposing tax on the property of a State. Relevantly, s 15(aa) of the *Local Government (Financial Assistance) Act 1995* (Cth) ("the Act") makes it a condition of grants of local government financial assistance that States withhold amounts of notional GST payments that "should have, but have not, been paid by local governing bodies" and pay it to the Commonwealth. Section 15(c) of the Act provides that if the relevant federal Minister notifies the Treasurer of a State that the State has failed to comply with the condition in s 15(aa), the State must repay to the Commonwealth an amount determined by the federal Minister that is not more than the amount the State has failed to pay.

The plaintiff, the Hornsby Shire Council ("the Council"), is a NSW local government body. On 24 May 2022, the Council sold a car at an auction, the proceeds of which included an amount of $3,181.82 described as notional GST. In July 2022, the Council lodged with the Commissioner of Taxation an amended Business Activity Statement ("BAS") for May 2022, which included the sum of notional GST. That BAS resulted in a liability to pay GST in the sum of $3,146, which reflected the inclusion of the notional GST. The Council paid the sum under protest, contending that the GST liability arising from the inclusion of notional GST in its BAS was a tax on State property contrary to s 114 of the *Constitution*. The Council subsequently commenced proceedings against the Commonwealth and NSW in the original jurisdiction of the High Court, seeking restitutionary relief.

The dispute concerned whether the payment of notional GST was a compulsory exaction enforceable by law (that is, a tax) or an entirely voluntary act. The Council contended that, as a matter of law, it was compelled to pay notional GST by reason of ss 15(aa) and 15(c) of the Act. In addition, the Council submitted that it was practically compelled to pay notional GST, and this amounted to a "forced benevolence" and thus a tax. Finally, the Council contended that the combined operation of certain provisions in the Act, the *Federal Financial Relations Act 2009* (Cth), and the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW), constituted a "circuitous device" by which the constitutional prohibition in s 114 was impermissibly circumvented.

The High Court unanimously held that the inclusion by the Council of notional GST in its BAS was a voluntary act made in accordance with an Intergovernmental Agreement entered into by the

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Commonwealth and each State and Territory, initially in 1999 and again in 2009. No federal law legally or practically compelled the Council to include that notional GST in its BAS. Accordingly, ss 15(aa) and 15(c) of the Act did not impose a tax for the purposes of s 114 of the *Constitution*.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*