



# HIGH COURT OF AUSTRALIA

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### Details of Filing

File Number: S202/2021  
File Title: Hornsby Shire Council v. Commonwealth of Australia & Anor  
Registry: Sydney  
Document filed: Form 27F - Outline of oral argument  
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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

**THE STATE OF NEW SOUTH WALES**  
 Second Defendant

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY GENERAL FOR  
 WESTERN AUSTRALIA (INTERVENING)**

**PART I: SUITABILITY FOR PUBLICATION**

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

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**PART II: ORAL OUTLINE OF SUBMISSIONS**

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2. **No entitlement / right to notional GST amounts** - A fundamental flaw in the plaintiff's case is that it assumes that the plaintiff is entitled to receive the full amount of grant money annually, including an amount equal to notional GST. However, the plaintiff never has any presumptive entitlement or legal right in a subsequent year to be paid grant money, without accounting for notional GST in previous years. Section 15(aa) of the *Local Government (Financial Assistance) Act 1995* (Cth) makes that plain. The old "Financial Relations Act" (*A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth) is irrelevant.
3. **Real Choice between Immediate / Deferred Payment** - The plaintiff may choose to pay notional GST immediately from its property, including money granted to it, or it may choose to receive a reduced amount of grant money in the future with the amount of the notional GST deducted. The ability to choose is acknowledged by s.5 of the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) which provides that a State Entity "may pay" notional GST. The plaintiff does not explain why this choice is not revenue neutral: compare Reply [10]-[11]. It certainly does not show that it presents only one "rational economic choice" (cf *ACT v Queanbeyan City Council* (**JBA 13/84/5365**) at [76] (Keane CJ)).

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4. **No Taxation Properly Characterised** – The plaintiff claims that s.15(aa) effectively imposes taxation upon it, by a compulsory exaction, forced benevolence or circuitous device. The scheme for notional GST does not compulsorily exact or practically compel payment of any money which was the plaintiff’s property or to which the plaintiff was entitled. The plaintiff has never had any entitlement to the notional GST amounts in each and every year. The plaintiff may voluntarily choose to pay notional GST; or it may rationally choose not to pay the notional GST, with the effect that this equivalently reduces the amount paid to the plaintiff subsequently. Equally, there is no “forced benevolence” or “circuitous device” requiring the plaintiff to pay notional GST from property to which it is entitled.
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5. **The Plaintiff’s Characterisation Error** - If the plaintiff voluntarily chooses to pay notional GST, the practical effect of the legislative provisions under challenge, including s.15(aa), might appear similar to a taxation regime. But it does not follow that an alternative means of achieving the same result, by reducing the amount of subsequent grant moneys, is unconstitutional. It is backwards or teleological reasoning to start from a result which would be unconstitutional if done by one means, and to say that the actual legal mechanism which was adopted (even if independently valid) must be unconstitutional as well.
6. **Authority** - This analysis is consistent with authority:
- 20 (a) the only case where practical compulsion to pay an amount was held to have constituted a tax is AG v Homebush (JBA 4/26/1296). There was no other “rational economic choice” available but to pay the legislative charge;
- (b) there is no forced benevolence, disguised as a gift to the Commonwealth to avoid substantial detriment, comparable to authority at PS [42];
- (c) the relevant prohibition is against the Commonwealth taxing State property. However, there is no tax by the Commonwealth or by the State, just as there was no acquisition of property in ICM (JBA 7/44/2874). Hence, there is no question of a circuitous device.

Dated: 19 April 2023

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J A Thomson SC



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