



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

S202/2021

BETWEEN: **HORNSBY SHIRE COUNCIL**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant
STATE OF NEW SOUTH WALES
Second Defendant

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OUTLINE OF ORAL SUBMISSIONS OF THE PLAINTIFF

Filed on behalf of: Hornsby Shire Council, plaintiff
Date of document: 18 April 2023

PART I INTERNET PUBLICATION

This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

1. **Overview of the legislation and the concept of ‘notional GST’ (PS [5]-[13])**
 - 1.1 Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations (**1999 Agreement**) (JBA 2:883) (Special Case (SC) [15], p 155).
 - 1.2 *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) (JBA 2:880), ss 4 and 5.
 - 10 1.3 *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth) (**Financial Arrangements Act 1999**), ss 3, 5, 10 and 20 (SC at [18(a)], [43]-[48]).
 - 1.4 Second Reading Speech and Explanatory Memorandum to the Local Government (Financial Assistance) Amendment Bill 2000 (SC [18], pp179 and 181-2).
 - 1.5 *Local Government (Financial Assistance) Amendment Act 2000* (Cth) (**Amendment Act**) (JBA 3:972).
 - 1.6 *Local Government Financial Assistance Act 1995* (Cth) (**Financial Assistance Act**) (JBA 1:124), ss 3, 6, 9, 11, 15, 19.
 - 1.7 *Federal Financial Relations Act 2009* (Cth) (JBA 1:86), ss 3 - 6, 22.
 - 1.8 Intergovernmental Agreement on Federal Financial Relations (**2009 Agreement**) (SC
20 [25], p235), cll A.28, D.45.
 - 1.9 *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) (JBA 1:163), ss 9-5, 9-40, 9-70, 9-75, 195-1 (definition of “GST”), 177-3.
 - 1.10 *A New Tax System (Goods and Services Tax Imposition – General) Act 1999* (Cth) (**Imposition Act**) (JBA 2:871), ss 3, 5.
 - 1.11 Plaintiff’s BAS, payment of notional GST and annual certification of payment in respect of vehicle (SC [20], [51], pp 196-197, 290, 293, 296).
2. **What is a tax? (PS [34]-[36])**
 - 2.1 The impugned provisions in the Financial Assistance Act fall into the quintessential case of a tax: *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 466-
30 468 (JBA 4:1066).
 - 2.2 A payment that fits the criteria of a tax, is a tax regardless of whether it was purportedly enacted under the taxation power of s 51(ii) of the Constitution: (Reply at [5], fn 12), e.g., *Air Caledonie; Australian Tape Manufacturers Association v Commonwealth* (1993) 176 CLR 480 (JBA 4:1432); *Roy Morgan Research Pty v Commissioner of Taxation* (2011)

244 CLR 97 (JBA 11:4522); *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 (JBA 4:1296).

3. **Compulsion (PS [37]-[40], Reply [8]-[18])**

- 3.1 There is a legal compulsion to pay notional GST or its equivalent amount, to the Commonwealth.
- 3.2 The impost is in s 15(aa) of the Financial Assistance Act, as enforced through s 15(c). Section 15(aa) is both the impost and the collection mechanism.
- 3.3 The legal sanction on NSW at s 15(c) is enforceable at law: *Mallinson v Scottish Australian Investment Company* (1920) 28 CLR 66 at 70-72 (JBA 8:3357).
- 10 3.4 It is sufficient for liability to be on the plaintiff to pay, but legal sanction to fall on the State (the enforceable debtor) and the equivalent amount is withheld from the plaintiff: it need not be notional GST *per se*: *Air Caledonie* at 464, 468 (JBA 4:1066).
- 3.5 Even if there is no express legal compulsion on the plaintiff, the practical compulsion imposed by s 15(aa) (and the legal consequence imposed on NSW) is sufficient to constitute a tax: *Homebush Flour Mills* at 397-400, 405, 414 (JBA 4:1296).
- 3.6 Where, as in *Homebush Flour Mills*, consequences for the plaintiff leave no ‘real choice’ but payment of the charge, there is a tax. Here, practical compulsion is demonstrated by certainty of exaction by one of three methods: by the plaintiff through its monthly BAS lodgment; by NSW withholding and paying to the Commonwealth an equivalent amount
20 from the plaintiff under s 15(aa); and, if not withheld, paid by NSW under s 15(c).
- 3.7 The enforcement is not arid as the notional GST paid, or should have been paid, forms part of “GST revenue” for calculating GST revenue grants under the *Federal Financial Relations Act*.
- 3.8 There is no rational basis to infer States would reject the grant. That option is illusory.
- 3.9 Having accepted the grant, the legal effect is that the plaintiff cannot escape the tax.
- 3.10 Here the nature of the collection mechanism leaves no real choice about whether the notional GST is paid: the only choice is as to how it is paid not whether it is paid.
- 3.11 If s 15(aa) is not a direct impost, as enforced through s15(c), there is a circuitous device (i.e., a tax by indirect but nonetheless legal means) by which, in combination, one or more
30 provisions of the scheme compulsorily impose notional GST.
- 3.12 A circuitous device can impose a tax by reference to practical effect. The device here is a result of legal consequences: payment of notional GST is not voluntary. As intended, local councils are treated the same as non-State entities who are liable for GST.

3.13 The enforcement consequences in 15(aa) and 15(c) reveal the position that the notional GST is compulsory.

4. **Section 96 is necessarily affected or limited by s 114 of the Constitution** (PS [14]-[33], Reply [4]-[7])

5. The power of s 96 of the Constitution is not unlimited: *South Australia v Commonwealth* (1942) 65 CLR 373 (JBA 11:4674); *Victoria v Commonwealth* (1957) 99 CLR 575 (JBA 11:4969); *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 (JBA 9: 3937); *Pye v Renshaw* (1951) 84 CLR 58 (JBA 9:3987); *Attorney General for Victoria (Ex rel Black) v Commonwealth* (1980) 146 CLR 559 (JBA 4:1329); *Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (JBA 9:3599); *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 (JBA 7:2874).

5.1 By analogy with cases on s 51(xxxi) and s 116, s 96 would be construed as being constrained by s 114, it being an important immunity that restrains the exercise of the Commonwealth's legislative power and as close to a blanket prohibition as one can get: *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 (JBA 11:4616); *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 (JBA 9:3564); *Bank of NSW v Commonwealth* (1948) 76 CLR 1 (JBA 4:1487, 5:1852).

6. **The legislative regime is properly characterised as a reduction in entitlement, not an integer in the calculation of the grant**

6.1 This is shown by its purpose and context (including supporting machinery); the text and its effect; and the importance of s 114 as a constitutional immunity.

7. **Restitution** (PS [59]-[69], Reply [21])

7.1 On the established premise that notional GST is an invalid tax and the agreed facts in this case, the plaintiff's entitlement to restitution is made out.

7.2 No cogent reason is suggested for not granting relief.

7.3 There are good reasons to accept that an unconstitutional tax provides the necessary unjust factor (*Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70) or the right to the remedy in *Kingstreet Investments v New Brunswick* [2007] 1 SCR 3 at [31] and [32], especially where the constitutional contravention was by design and having regard to the power imbalance between the Commonwealth and taxpayers.

Dated: 18 April 2023

R Seiden

M Robinson

E Bishop

WR Johnson

D Woods