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** S202/2021

**BETWEEN:** **HORNSBY SHIRE COUNCIL**
Plaintiff

**AND:** **COMMONWEALTH OF AUSTRALIA**
First Defendant

**STATE OF NEW SOUTH WALES**
Second Defendant

## PLAINTIFF'S SUBMISSIONS ON THE SPECIAL CASE

(These submissions are in a form suitable for publication on the internet)

1. The plaintiff moves on the special case made on 5 September 2022 by order of the Court (**special case**). The special case concerns the constitutional question of whether the ostensible goods and services tax (**GST**) reported and paid under protest by the plaintiff (the **notional GST**), on the sale on 24 May 2022 of its Holden Colorado 7 LT Trailblazer (the **vehicle**) (special case at [57], [58], [62], [65]-[66]) is an unconstitutional tax. The plaintiff has given notices in compliance with s 78B of the *Judiciary Act 1903* (Cth).

2. Key aspects of the legislative regime under which the plaintiff reported and paid the notional GST, impose a tax on property of a State, contrary to s 114 of the *Commonwealth of Australia Constitution Act* (**Constitution**). That legislative regime, central to which is a Commonwealth law purportedly made pursuant to its legislative power under s 96 of the Constitution, compulsorily exacts notional GST from the plaintiff in one of three ways:
   (a) s 15(aa) of the *Local Government (Financial Assistance) Act 1995* (Cth) (**Financial Assistance Act**), being the collection mechanism and the point of impost;
   (b) a forced benevolence; or
   (c) to the extent that no one provision is considered the impost, by a circuitous device.

3. The plaintiff also seeks restitution from the Commonwealth of the $3,182 notional GST paid in relation to the sale of the vehicle and interest by reason of it being unjust for the Commonwealth to retain an ultra vires or unconstitutional tax.

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Filed on behalf of: Hornsby Shire Council, plaintiff
Date of document: 31 October 2022

**Central to the argument**

4. Section 114 relevantly provides:

> "A state shall not, without the consent of the Parliament of the Commonwealth ... impose any tax on property of any kind belonging to the Commonwealth, *nor shall the Commonwealth impose any tax on property of any kind belonging to a State*." (emphasis added)

**The legislative scheme imposing notional GST on the plaintiff**

5. A person registered for GST must pay GST on any "taxable supply" they make: *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**), ss 7-1(1), 9-5, 9-40. A "taxable supply" includes, amongst other things, a supply of goods for consideration that is made in the course of an enterprise: GST Act, s 9-5, 9-10(2)(a).

6. GST is imposed as a tax principally by s 3 of each of three enactments (collectively the "**Imposition Acts**").[1] The Imposition Acts are sensitive to the prohibition in s 114 of the Constitution in that there is an exception to s 3 in s 5 of each of the Imposition Acts, which provides:

> "(1) This Act does not impose a tax on property of any kind belonging to a State.
>
> (2) ***Property of any kind belonging to a State*** has the meaning as in section 114 of the Constitution."

7. But for s 5 of the Imposition Acts, s 3 of the Imposition Acts and the GST Act would impose GST on the plaintiff for, and the requirement to pay GST on, the sale of the vehicle and there would exist the necessary connection between that tax and the plaintiff's property to be considered a tax on property belonging to a State contrary to s 114 of the Constitution.[2]

8. Instead, prior to the introduction of the GST, the heads of Commonwealth, State and Territory governments entered into an intergovernmental agreement referred to in the special case as the "1999 Agreement" (see special case (at [14]-[17]), a copy of which is at Annexure C of the special case, pp. 38-61. Under the 1999 Agreement:

   (a) (clause 17): The parties agreed that *local governments…* will operate as if they were subject to the GST legislation. They will be entitled to register, *will pay GST or make voluntary or notional payments where necessary* and will be entitled to claim

[1] *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) and *A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999* (Cth).

[2] The provisions of the GST Act that create the obligation to pay GST to the Commonwealth include ss 7-15, 17-5 (which deal with calculation of the net amount) and 9-40.

input tax credits in the same way as non-Government organisations. *All such payments will be included in GST revenue.*

(b) (clause 18): *The Commonwealth will legislate to require the States* and the Northern Territory *to withhold from any local government authority being in breach of Clause 17 a sum representing the amount of unpaid voluntary or notional GST payments.* Amounts withheld will form part of the GST revenue pool (our emphasis).

9. Clauses 17 and 18 of the 1999 Agreement are given legislative effect by:

(a) ss 6(3)(a)(ii) and 6(3)(c) of the *Federal Financial Relations Act 2009* (Cth) (**Financial Relations Act**), which ensure that notional GST collected in a payment year forms part of that year's GST revenue; and

(b) s 15(aa) of the Financial Assistance Act and other amendments, which were introduced into that Act by Items 16, 17 and 18 of Sch 1 of the *Local Government (Financial Assistance) Amendment Act 2000* (Cth).

10. It is plain from the second reading speech and explanatory memorandum for the *Local Government (Financial Assistance) Amendment Bill 2000* (pages 63 and 65 of the special case) that the purpose of s 15(aa) was to implement the Commonwealth's undertaking given in the 1999 Agreement to "require" the States and Northern Territory to withhold an amount from any local council "in breach of clause 17 of the 1999 Agreement" equal to any unpaid notional GST.

11. Thereafter, the conditions imposed under s 15 of the Financial Assistance Act on the making of grants of financial assistance by the Commonwealth for local government purposes (as defined in the special case at [38]) have included conditions as follows:

> **"15 Conditions of payments to States other than the Australian Capital Territory**
> Payment of an amount to a State …under this Act in respect of a year is subject to:
> (a) a condition, *subject to the condition in paragraph (aa),* that the State will:
> (i) if the payment is made under section 9—without undue delay, make unconditional payments to local governing bodies in the State …; and
> …
> (aa) a condition that, 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; and
> …
> (c) a condition that, *if* the Minister … is satisfied that *the State has*, … *failed to fulfil any of the conditions applicable under paragraphs (a), (aa) and (b) to the payment of the amount, the State will repay to the Commonwealth any amount* ...." (our emphasis)

12. The second defendant legislated to give effect to the 1999 Agreement through the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) (**NSW Implementation Act**). Section 4 of the NSW Implementation Act incorporates the 1999 Agreement in Schedule 1 to the Act. Section 5 purports to permit local councils to pay notional GST to the Commissioner of Taxation and "do all things of a kind that it would be necessary and expedient for it to do if it were liable for that GST". Having regard to the GST Act, "all things of a kind" necessarily includes the local council reporting supplies made in respect of its property, and notional GST in respect of such supplies, in its BAS form (which does not differentiate notional GST from GST) for the relevant period, which means that notional GST is used to calculate and assess the local council's liability or entitlement in respect of the net amount (as described in the special case at [29]-[34]).

13. The condition imposed by the Commonwealth in s 15(aa) of the Financial Assistance Act affects the grant of financial assistance for local government purposes that a local council is allocated to receive the following financial year. The allocation is calculated by a statutory formula and in accordance with national principles designed to ensure that each local council in a State "is able to function, by reasonable effort, at a standard not lower than the average standard" of other local councils in the State and that takes account of differences in the expenditure required by those local councils in the performance of those functions and in the capacity of those local councils to raise revenue: s 6(3)(a) and (b) of the Financial Assistance Act; A.1 of the National Principles at page 166 of the special case; special case at [43]-[48]. Further, such grants are for the express legislative purposes of improving: the financial capacity of local councils; the capacity of local councils to provide their residents with an equitable level of services; the certainty of funding for local councils; and the efficiency and effectiveness of local governing bodies: Financial Assistance Act, sub-ss 3(2)(a) to (d).

**Sections 114 and 96 of the Constitution**

14. Section 96 of the Constitution permits the Commonwealth to provide financial assistance to a State "on such terms and conditions as Parliament thinks fit".

15. The power to impose conditions is subject to s 81 of the Constitution, which requires money from the Consolidated Revenue Fund to be appropriated "in the manner and subject to the charges and liabilities imposed by this Constitution". Accordingly, the Constitution requires the Consolidated Revenue Fund to be appropriated in a manner that does not infringe constitutional prohibitions, including s 114.

16. It is not in dispute here that the plaintiff is a "State" within the meaning of s 114 of the Constitution[3] (special case at [49(c)]). The plaintiff has a legal personality separate from the second defendant: *Local Government Act 1993* (NSW), s 220; special case at [49(a), (b)]. Accordingly, the Commonwealth is prohibited under s 114 from imposing a tax (whether under the guise of s 96 or s 51(ii)) on property of any kind belonging to the plaintiff.

17. Further, s 114 operates independently from s 81 as a restriction on the Commonwealth's legislative power to make laws under s 96.[4]

18. The power of the Commonwealth in s 51(ii) of the Constitution to make laws with respect to taxation, which is expressed to be "subject to this Constitution", is subject also to s 114.[5]

19. In *R v Barger* (1908) 6 CLR 41, Isaacs J said (at 82):

> "Not all taxation can be sustained as valid. Thus, if imposed upon any State instrumentality or act of Government, or if it discriminates between State and State or parts of States: (secs. 51 (II.) and 99), or offends against sec. 55, or contravenes sec. 92, or is a tax against State property within the meaning of sec.114, or, in breach of sec.117, discriminates between residents of different States, the Act would be invalid, at least *pro tanto*."

20. Section 114 of the Constitution imposes a direct restriction upon the legislative powers of the Commonwealth conferred by other sections of the Constitution.

21. Section 114 is an important immunity that restrains the exercise of the Commonwealth's legislative power in certain circumstances.[6]

22. As to the characterisation of s 114 as a constitutional prohibition, the Court will "stand as the guardian of obedience to [important constitutional prohibitions]" to ensure they are not circumvented.[7] It cannot be breached directly and it cannot be breached indirectly.[8] Other powers in the Constitution that could be considered as prohibitions include s 51(xxxi) (just terms), s 51(xxiiiA) (civil conscription), s 51(xiii and xiv) (banking and

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[3] *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, 230.
[4] See *Attorney General for Victoria, Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 576 (***Ex rel Black***), per Barwick CJ; 649-651, per Wilson J; at 593, per Gibbs J; Aicken and Mason JJ agreeing.
[5] *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 76 [46].

[6] See, e.g., *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 78 [51].
[7] *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 252 [266] per Kirby J; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 213.
[8] *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305; D.K. Singh, 'What Cannot be Done Directly Cannot be Done Indirectly' (1959) 32 ALJR 374; (1959) 33 ALJR 3.

insurance), s 90 (customs and excise), s 92 (free trade), s 116 (religion), s 99 (giving preference to one State) and s 100 (State use of water).

23. That s 114 imposes a limit on the scope of s 96 is supported by the decisions in which there has been discussion of the relationship between on the one hand the power under s 96 to legislate for grants and on the other to evade restrictions in the Constitution on Commonwealth legislative power. In this regard, a distinction is to be drawn between:

(a) instances where the conditions attached to a grant under s 96 may require the grantee State to do something which the Commonwealth does not itself have legislative power to do; and

(b) instances where the conditions attached to a grant require action which is in contravention of a constitutional prohibition.

24. It is established that laws in the categories in paragraph (a) above are valid.[9]

25. Laws in the category referred to in paragraph (b) are in a different position. *Ex rel Black* concerned the relationship between ss 96 and 116 of the Constitution. Section 116 is the provision which essentially provides that the Commonwealth shall not make laws for establishing any religion. While it was held that the proposed law did not contravene s 116, there are observations which support the view that s 96 was subject to restrictions, including those in s 116.

26. Thus, in *Ex rel Black*, Barwick CJ said at 576:

> "Section 116 in terms applies to all laws, in my opinion, without exception. The Parliament "shall not make any law for establishing any religion". *I can find no acceptable reason for excluding from this universality . . . an Act granting money to a State pursuant to s. 96.* " (our emphasis)

27. Gibbs J (at 593) held that:

> "... Parliament, acting under s. 96, cannot pass a law which conflicts with s. 116",

commenting:

> "It is one thing to say that the Parliament, by a condition imposed under s. 96, could achieve a result which it lacks power to bring about by direct legislation, but quite another to say that the Parliament can frame a condition for the purpose of evading an express prohibition contained in the Constitution."

28. Aickin J (at 635) agreed with those reasons. See too, Mason J (at 616).

29. Wilson J's reasons (at 649-651), with which Barwick CJ substantially agreed (at 585), were to the same effect. He said (at 650):

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[9] See e.g., *Ex rel Black* at 584 per Barwick CJ and at 593 per Gibbs J.

> "In *P.J. Magennis Pty Ltd v. The Commonwealth*... this Court held to be invalid a law which approved an agreement between the Commonwealth and the State of New South Wales relating to war service land settlement. … A majority of the members of the Court held the law to contravene s 5l(xxxi.) because it failed to provide just terms for the acquisition of the property. The Chief Justice, Sir John Latham, dismissed summarily an argument based on s. 96, saying …: " ... there is no substance in the objection that the Act is an Act giving financial assistance to States (Constitution, s. 96), and is therefore not a law with respect to the acquisition of property." ... in my respectful opinion *Magennis* remains a persuasive analogy."

30. The approach taken in *Ex rel Black* was accepted in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 (***ICM Agriculture***) by French CJ, Gummow and Crennan JJ at 170, [45]-[46] when their Honours concluded that the legislative power of the Commonwealth conferred by s 96 and s 51(xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms. While generally the Commonwealth "may properly induce a State to exercise its powers … by offering a money grant",[10] the means and ends must be consistent with and not in contravention of the Constitution.[11]

31. Section 114 of the Constitution should, for reasons similar to those in *Ex rel Black* and *ICM Agriculture* in relation to ss 116 and 51(xxxi) (just terms), be a restriction on the power to make laws under s 96. The restriction does not derive from s 81 of the Constitution, but rather from the combination of ss 96 and 114.

32. The conclusion is that the Commonwealth has power to make laws under s 96 (and s 51(ii)), but that power does not extend to laws which operate to circumvent s 114.

33. If notional GST is indeed a tax, it is unconstitutional.

**Notional GST is a tax**

34. In a sequence of cases dealing with exactions,[12] the Court has established that the positive indicia of a tax for the purposes of the Constitution are all of the following: it is imposed by a public body and collected by a public body; it is for public purposes; it takes a monetary form; the amounts withheld are to be paid into Consolidated Revenue; and compliance with it is compulsory.

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[10] *South Australia v The Commonwealth* (1942) 65 CLR 373 at 417 per Latham CJ.
[11] *ICM Agriculture* at 165 [29] and 167 [33 ] per French CJ, Gummow and Crennan JJ, citing *R v Hughes* (2000) 202 CLR 535 at 554-555 [38] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.
[12] E.g., *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276 per Latham CJ; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639, 640; *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 466-467; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 581; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2011) 244 CLR 97.

35. For purposes of the Constitution, there are also negative indicia.[13] The indicia which tend against an exaction being a tax are not present in this case: notional GST is not demanded as a penalty for any unlawful act or omission of any person; it is not a fee for any form of service provided by the Commonwealth; it is not arbitrary; and it is not a charge for the acquisition of property or a fee for a privilege or for any other disqualifying item recognised by constitutional jurisprudence.

36. It is uncontentious that notional GST (like GST revenue) is collected by the Commonwealth, takes a monetary form and is paid into the Consolidated Revenue Fund and therefore deemed to be used for public purposes (special case at [35]-[37]).[14] The positive indicia that are anticipated to be contentious in relation to notional GST is whether its exaction is compulsory and, perhaps too, whether it is "imposed" by a public body (specifically, the Commonwealth). These two issues are addressed below.

*Section 15(aa) compulsorily exacts notional GST*

37. Either legal compulsion or practical compulsion is sufficient to create a compulsory exaction.[15] The chapeau to s 15 of the Financial Assistance Act expressly provides that the grant is "subject to" the various conditions in the sub-paragraphs which follow it.

38. Both the second defendant and the plaintiff are under compulsion to comply with conditions of the grant. This is for the reasons set out below:

Compulsion of the second defendant

(a) When the second defendant receives its local government financial assistance entitlement from the Commonwealth each year, it is compelled to pay it to local councils (s 15(a)), but s 15(aa) of the Financial Assistance Act compels it to withhold from any local council that has not paid its notional GST for the prior year, an amount equal to the amount that the council should have paid. The second defendant is then compelled, by operation of s 15(aa) or s 15(c) of the Financial Assistance Act, to pay that amount to the Commonwealth.

Compulsion of the plaintiff

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[13] *Air Calédonie International v The Commonwealth* (1988) 165 CLR 462 at 466-467, referring to *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276 per Latham CJ, *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639*; Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684.

[14] *Australia Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 503, per Mason CJ, Brennan, Deane and Gaudron JJ.

[15] *Attorney-General (NSW) v Homebush Flour Mills* (1937) 56 CLR 390 at 400, 405, 413; *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 561 at 549-550, 568.

(b) The plaintiff is compelled to pay notional GST to the Commonwealth because s 15(aa) of the Financial Assistance Act is such that whether by "voluntary" remittance by the plaintiff, or by a later withholding and remittance by the second defendant under s 15(c), the Commonwealth must receive from the plaintiff an amount equivalent to the notional GST.

(c) The plaintiff is exposed to detrimental consequences should it fail to pay notional GST because in the year following non-payment, it would not receive the full grant to which it was otherwise entitled, from which it follows that the plaintiff is at risk of being forced to function with more than reasonable effort, at a standard lower than the average standard of other local governing bodies in that State and less than it needs: see paragraph 13 above. These grants comprise 2 per cent of the plaintiff's annual revenue (special case at [54]). If amounts from the grants to the plaintiff were withheld from it, the plaintiff's ability to fund capital and operating projects for its community such as sporting ovals, grandstands, bridges and maintenance of infrastructure would be compromised (special case at [55]).

(d) Also, non-compliance with laws and regulations and circulars issued by the NSW Government may result in further review or adverse action as to the management of the plaintiff by the NSW Office of Local Government generally, or pursuant to ss 429, 430, 438I, 438M, 438Y and/or 438U of the *Local Government Act 1993* (NSW) (special case at [20] and [51]).

(e) The words "should have, but have not, been paid" in s 15(aa) reinforce, or implicitly accept, that the plaintiff is required to pay notional GST, with the withholding condition in s 15(aa) being the legislative stick to compel the plaintiff to pay.

39. Section 15(aa) of the Financial Assistance Act is the principal provision that imposes a tax on the plaintiff's property in contravention of the prohibition in s 114: withholding from the grant otherwise allocated to the plaintiff the amounts of notional GST "that should have, but have not, been paid by" necessarily means that the plaintiff was required or obliged to pay the notional GST. Section 15(aa) is supported by s 15(c): if the second defendant does not withhold, it will be liable for the amount. At the least, this ensures compliance by the second defendant, or the plaintiff may be liable to repay the second defendant: by analogy with the principles explained in *Mallinson v Scottish Australian Investment Company Ltd* (1920) 28 CLR 66, noting that the Financial Assistance Act does

not provide an alternative recovery mechanism to the second defendant nor a provision to the contrary of such a remedy existing.[16]

40. It is therefore apt to describe s 15 of the Financial Assistance Act as providing for the grant with "legal sanctions" (a term used in *Pape v FCT* (2009) 238 CLR 1 at 196-197 [560] by reference to *Attorney-General (Vic) v The Commonwealth* (1945) 71 CLR 237) for non-compliance with the conditions in s 15(aa) of that Act (i.e., s 15(c) Financial Assistance Act). And, it is apt to say that the conditions in s 15(aa) and (c) are compulsory.

*Forced benevolence*

41. A series of legal and practical compulsions, as part of a scheme, giving rise to a practically "forced benevolence" may amount to a tax.[17]

42. The principle that "voluntary" benevolences may amount to a compulsive exaction, i.e., a tax, has long been recognised, originating in the historical cases of specious prerogative levies before prohibition in the Petition of Right 1628.[18] In essence, a forced benevolence is a payment of money, disguised as a gift to the King, without Parliamentary approval. In 1473 Edward IV asked for 'benevolence' as a demonstration of good will by his people, pursuant to his journey to France. The consequences for not making the 'donation' were often dire.[19] Despite the 1484 Act of Richard III abolishing benevolences, Henry VII and James I continued to demand benevolences until the Petition of Right in 1628 reaffirmed the 1484 Act.

43. More recently, the principle has arisen in the context of amounts payable under agreements between the Executive and other persons absent legislative approval or (as is the present case) contrary to a Constitutional prohibition.[20] In *Homebush Flour Mills* at 400, per Latham CJ observed:

> "…it is said, a sum paid under an agreement cannot be regarded as a tax. This argument has at least the merit of an ancient and hoary lineage. "Voluntary loans" and "gracious offerings" and "forced benevolences" are not unknown in our history. When such transactions amount to the exaction by a government in obedience to what is really a

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[16] (1920) 28 CLR 66 at 70-72, applied in *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 312-313 [64]-[65]; *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at 493-494 [51]; *Commissioner of Taxation v Barnes Development Pty Ltd* (2009) 178 FCR 352.
[17] *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 (***Homebush Flour Mills***) at 400 per Latham CJ.
[18] *Hampden's Case* (1637) 3 St.Tr. 825; *Darnell's case* (1627) 3 How St Tr 1; *Bate's Case* (1606) 2 St.Tr. 371.
[19] Thomas Taswell-Langmead, *English Constitutional History* (Originally published 1880, 5th edn, Stevens & Haynes 1896).
[20] *Commonwealth and Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421; *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884; *Health Insurance Commission v Peverill* (1994) 179 CLR 226.

compulsive demand the money paid is paid as a tax (*Commonwealth and Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd*…; *Attorney-General v Wilts United Dairies Ltd*…)"

44. Paraphrasing the comments of Dixon J in *Homebush Flour Mills* at 412, even if s 15(aa) of the Financial Assistance Act does not impose an ordinary legal duty to pay notional GST enforceable by judicial process (nor any one provision in the legislative regime, in isolation), it makes the raising of money (notional GST) its purpose and seeks to secure fulfilment of that purpose by imposing a clear detriment upon a local council if it refrains from paying notional GST. This is indistinguishable from a sanction incurred by failure to pay.[21]

45. In the event the plaintiff does not pay the notional GST, the amount will be taken from it. Section 15(aa) of the Financial Assistance Act, in concert with s 15(c) and the consequences of any withholding from the grant, imposes a "forced benevolence."

46. Notional GST is not truly a "voluntary" payment if the only real choice the plaintiff has is pay the notional GST or, through ss 15(aa) or (c) of the Financial Assistance Act, have the second defendant take the amount from the grant allocated to the plaintiff or pay it to the Commonwealth on its behalf (with an implication it is to be repaid to NSW: see paragraphs 39 and 40 above). Either way, it is a compulsory exaction pursuant to which the Commonwealth gets paid the notional GST.

47. Insofar as the second defendant undertakes the role of the Commonwealth's collection agent under ss 15(aa) or (c), an analogy might be drawn to the case of *Deputy Commissioner of Taxation v Woodhams* (2000) 199 CLR 370 where employees' tax was collected through the expedient of the employer's withholding and remittance obligations.

*Circuitous device*

48. If not directly by s 15(aa) of the Financial Assistance Act or by forced benevolence, the combined operation of the legislation pursuant to which the 1999 Agreement is deployed (described at paragraphs 9 to 13 above), namely ss 6(8), 11(3), 14(3), 15(aa) and 15(c) of the Financial Assistance Act, ss 6(3)(a)(ii) and 6(3)(c) of the Financial Relations Act, and ss 4 and 5 of the NSW Implementation Act (**legislative regime**) constitutes a circuitous device by which the constitutional prohibition in s 114 is impermissibly circumvented.

[21] In *Homebush Flour Mills,* Starke J, in a separate but concurring judgment, also held the substance and effect of the legislation to be a tax: see 405 and 408.

49. The purpose and legal effect of the legislative regime is to impose and collect the equivalent to GST from the plaintiff in respect of supplies of its property to add to the GST revenue component of the Consolidated Revenue Fund that has been promised to the States under the 1999 Agreement. While the Commonwealth avoids direct infringement of s 114 by s 5 of the Imposition Acts, the same result is achieved indirectly through the legislative regime.

50. As identified at paragraphs 5 to 13 above:

(a) sub-ss 15(aa) and (c) of the Financial Assistance Act compels the plaintiff (or the second defendant in the event of default by the plaintiff) to pay notional GST to the Commonwealth or else lose that same amount from grants of financial assistance paid by the Commonwealth to the second defendant for allocation to the plaintiff. This is the coercive element of the device;

(b) by virtue of s 4 of the NSW Implementation Act, the 1999 Agreement forms a Schedule to and therefore part of that Act;

(c) s 5 of the NSW Implementation Act permits the plaintiff (and other local councils within New South Wales) to pay notional GST and to treat supplies on its property the same as other supplies that the plaintiff makes for the purposes of the GST Act. As a result, notional GST is reported by the plaintiff in its BAS and the plaintiff becomes subject to the obligations and potential tax-related liabilities of the GST Act and *Taxation Administration Act 1953* (Cth) (**TAA**) in relation to notional GST; and

(d) ss 6(3)(a)(ii) and 6(3)(c) of the Financial Relations Act ensures that all notional GST that the plaintiff pays to the Commonwealth forms part of the GST revenue collected and distributed to the States and Territories in accordance with the 1999 Agreement.

51. As this Court has determined on numerous occasions, "what the Constitution forbids directly cannot be achieved indirectly or by means of some circuitous device".[22] *ICM Agriculture* and *Spencer v Commonwealth* (2018) 262 FCR 344 (***Spencer***) considered circuitous devices in the context of its consideration of whether the Commonwealth, by the use of legislation, had endeavoured to avoid the restriction in s 51(xxxi) (just terms) of the Constitution.

[22] *Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (1994) 179 CLR 155 at 173, per Mason CJ; *Bank of New South Wales v Commonwealth* (*Bank Nationalisation Case)* (1948) 76 CLR 1 at 349-350; *Wragg v NSW* (1953) 88 CLR 353 at 388 per Dixon CJ; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 407, per Gibbs CJ; *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 283, per Deane J.

52. Justices Hayne, Kiefel and Bell JJ noted in *ICM Agriculture*, at pages 198-199, that:

> "Because s 51(xxxi) "undertakes to forbid or restrain some legislative course" (249) and "should be given as full and flexible an operation as will cover the objects it was designed to effect" (250), its operation is not to be circumvented by some "circuitous device" (251).
>
> … a law may contravene the constitutional restraint on the power of acquisition – that just terms be provided – directly or indirectly, explicitly or implicitly. To adopt and adapt what Dixon J said in the context of s 92 in *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (256), however circuitous or disguised it may be, once it appears that the law is a law with respect to acquisition otherwise than on just terms, it is discovered to be an infringement of the restriction upon power contained in s 51(xxxi)."[23]

53. In *ICM Agriculture* the Court held that no issue of circuitous device arose.[24]

54. In *Spencer*, the Full Court of the Federal Court considered whether s 51(xxxi) would be infringed following the acquisition of property on unjust terms by a State, using financial assistance provided by the Commonwealth under s 96. This involved an intersection of two principles: "that the State can acquire property on any terms, just or unjust, as it chooses," and that, "the Constitutional provision under s 51(xxxi) would be ineffective if the Commonwealth could evade the just terms requirement by making an agreement for a State to acquire property on other than just terms."[25] The Court considered, per Perry J at [354], that:

> "Only where the terms and conditions of a s 96 grant require the State to acquire property otherwise than on just terms will the constitutional guarantee in s 51(xxxi) be infringed."

55. While not invalidated on the express ground of infringement of the Constitution by means of a circuitous device, the decisions in *Vacuum Oil Co Pty Ltd v Queensland* (1934) 51 CLR 108, *Fish Board v Paradiso* (1956) 95 CLR 443, *Mofflin Ltd v State of NSW* (1952) 85 CLR 488 and *Antill Ranger & Co v Commissioner for Motor Transport* (1955) 93 CLR 83 (***Antill***) may be capable of explanation on this footing.[26]

56. Insofar 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. This is clear from:

    (a) The Commonwealth introducing ss 15(aa) and 15(c) of the Financial Assistance Act to mandate the withholding of amounts of the Financial Assistance Act and facilitate compliance and collection; and

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[23] See too *ICM Agriculture* at 216 [192], per Heydon J.
[24] *ICM Agriculture* at 198 [136], per Hayne, Kiefel and Bell JJ.
[25] *Spencer* at [171], per Griffiths and Rangiah JJ.
[26] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 576 per Mason J.

(b) the process by which the plaintiff reported notional GST in its Amended May 2022 BAS was the product of the operation of Commonwealth legislation (GST Act, ss 31-5 and 31-25(2); special case at [61]-[62]), as was:

(i) the assessment of the net amount in relation to the sale of the vehicle (inclusive of the notional GST amount), it being conclusive evidence of the plaintiff's tax-related liability (special case at [34])[27];

(ii) the obligation to pay the net amount of $3,146 (special case at [34], [63] and [64])[28]; and

(iii) the mechanism for payment of the notional GST (once reported) (special case at [66]).[29]

**Constitutional invalidity of the legislation**

57. The Financial Assistance Act is principally an Act dealing with grants of financial assistance and other matters; not taxation. It follows that introducing ss 15(aa) (a law imposing a tax) into the Financial Assistance Act and references to it in ss 6(8), 11(3) and 15(c) of that Act, Items 16, 17 and 18 of Sch 1 to the *Local Government (Financial Assistance) Amendment Act 2000* (Cth) were contrary to s 55 of the Constitution; and invalid to the extent to which the laws infringe s 114 of the Constitution and/or are in excess of the Commonwealth's power under s 96: *Air Calédonie International & Ors v Commonwealth* (1988) 165 CLR 462; s 15A of the *Acts Interpretation Act 1901* (Cth).

58. The Financial Relations Act is also a Commonwealth Act that principally deals with matters other than taxation. If, in combination, the legislative regime as part of a circuitous device constitutes a tax, ss 6(3)(a)(ii) and 6(3)(c) of the Financial Relations Act are also contrary to s 55 of the Constitution and invalid, and ss 4 and 5 of the NSW Implementation Act are inoperable, to the extent to which the laws infringe s 114 of the Constitution and/or are in excess of the Commonwealth's power under s 96 of the Constitution.

**The plaintiff is entitled to relief by way of restitution**

59. By virtue of notional GST being unconstitutional, the plaintiff is entitled to restitution from the Commonwealth for the notional GST in the amount of $3,182 it received from the plaintiff in relation to the vehicle with interest and relies, first, on the principles in *Kingstreet Investments v New Brunswick* [2007] 1 SCR 3 (***Kingstreet***), second on the

[27] *Taxation Administration Act 1953* (Cth), s 350-10, item 2 of Sch 1 and s 155-15 of Sch 1.
[28] GST Act, ss 7-5 and 7-15.
[29] GST Act, ss 33-5, 33-10(2) and 35-5.

principles in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (***Woolwich***) and third, on more general notions of moneys had and received. On any view, once the circumstances (most if not all of which are non-contentious) set out below are considered, the plaintiff is entitled to the relief it seeks on any one of the identified bases:

(a) If notional GST is an unconstitutional tax, it is by definition an unlawful compulsory exaction imposed or demanded by the Commonwealth without authority (see paragraph 34 above).

(b) The 'compulsory exaction' is the product of Commonwealth legislation independently or in conjunction with NSW legislation.

(c) The mechanism for the reporting and payment of notional GST by local councils to the Commonwealth is a product of Commonwealth legislation such as the GST Act and the TAA (see paragraph 56(b) above). The tax-related liability of $3,146 arising from the Amended May 2022 BAS was enforceable as a debt to the Commonwealth pursuant to s 250-10(2), item 5 and s 255-5 of Schedule 1 to the TAA (special case at [34]) and as such payment of the notional GST was backed by the coercive might of the Commonwealth.[30]

(d) Under ss 15(aa) and 15(c) of the Financial Assistance Act, a failure by the plaintiff to pay the notional GST would result in an amount of the unpaid notional GST being withheld from the next grant for local government purposes otherwise payable to the plaintiff or the second defendant being required to pay the unpaid notional GST to the Commonwealth (special case at [41]).

(e) Such grants comprise 2 per cent of the plaintiff's annual revenue and are required to fund necessary capital and operating projects (special case at [43], [54]-[55]). As explained in paragraph 13 above, the amount of the grant is designed to ensure the plaintiff is able to function, by reasonable effort, at a standard not lower than the average standard of other local councils in the State.

(f) State circulars have been issued by the second defendant requiring the plaintiff to certify each year that it has paid notional GST, and it is the plaintiff's practice to act in accordance with those circulars (special case at [20], [51]-[52]). There is no record of local governments failing to pay notional GST (special case at [21]).

[30] *Woolwich* at 172F per Lord Goff.

(g) On 13 December 2021, the plaintiff formally protested against the unconstitutional tax by commencing these proceedings to challenge the validity of the legislation. The specific payment of notional GST in respect of the sale of the vehicle was made under a formal protest (special case at [65]-[66] and Annexure Q at p.178).

(h) The payment was not made to close out a transaction.[31]

(i) The alternative to payment (i.e., non-payment) was attended by economic and reputational disadvantage and therefore the choice to pay was not made freely.[32]

(j) Payment was made in reasonable apprehension of the consequence that the amount would be withheld from a grant under the Financial Assistance Act (cf sub-paragraph 61(e) above).[33]

60. Were the Court to adopt the Canadian position in respect of taxes demanded under an unconstitutional law, as determined in *Kingstreet*[34], the matters that must be established to ground recovery include simply: (1) the taxing provision is unconstitutional; and (2) the claimant has paid money pursuant to the unconstitutional tax. The Supreme Court of Canada identified that where the Crown obtains revenue as a consequence of having imposed an invalid tax, it is liable to make restitution of the amount of that revenue and the taxpayers have a remedy to recover amounts paid under the invalid tax "as a matter of constitutional right" (at [34]). Seminal to the decision was the constitutional principle of "no taxation without representation" (at [31]).

61. Here, it is uncontroversial that the plaintiff's right to proceed against the Commonwealth is implied in and arises under the Constitution itself (special case at [5]).[35] As to whether relief is a matter flowing from the Constitution, it was the view of the plurality in *British American Tobacco v State of Western Australia* (2003) 217 CLR 30 (***BAT***) that, in order

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[31] cf *Mason v New South Wales* (1959) 102 CLR 108 at 143, per Windeyer J.
[32] *Mason v New South Wales* at 128-129, per Kitto J.
[33] *Mason v New South Wales* at 117, per Dixon CJ; at 145-146, per Windeyer J.
[34] *Kingstreet* has not yet been applied in Australia: *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd; Australian Financial Services and Leasing Pty Ltd v Bosch Security Systems Pty Ltd* [2012] NSWCA 380. It has been approved in various appellate courts throughout Canada and elsewhere: *Steam Whistle Brewing Inc v Alberta Gaming and Liquor Commission* [2019] ABCA 468; *Amyotrophic Lateral Sclerosis Society of Essex County v Windsor (City)* 2017 ONCA 555 at [26]-[30]; *Sorbara v Canada (Attorney General)* 2009 ONCA 506 at [4]; *Sivia v British Columbia (Superintendent of Motor Vehicles)* 2012 BCSC 1030 at [97]. It has been considered in New Zealand: *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd (No 2)* [2012] NZHC 1996; *Forrest v Chief Executive of the Department of Corrections* (HC Wellington CIV-2011-. 409-1233, 2 December 2011, Gendall J); *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513.
[35] *British American Tobacco v State of Western Australia* (2003) 217 CLR 30 at [14]-[15] per Gleeson CJ; [40], per McHugh, Gummow and Hayne JJ; [154], per Kirby J; Constitution s 114, s 75(iii), s 76(i).

to obtain relief, there must be a vehicle sourced in the common law; the Constitution alone does not respond.[36]

62. There is, nevertheless, warrant for this Court to accept the proposition that (at least with respect to a breach of a prohibition under the Constitution concerning an ultra vires tax) both the right to proceed and the remedy flow from the infringement of the Constitution. The fundamental principle underlying the "constitutional right" found in *Kingstreet* of "no taxation without representation",[37] is reflected in the Australian Constitution.[38] The principle that the executive arm may not levy taxation and expend levied funds without the authorisation of the legislature is a "fundamental rule of public law" and an "important constitutional value".[39]

63. The plaintiff's second contention is that the Court has, in substance if not in express terms, endorsed the principle identified by the plurality in *Woolwich* and that such an approach would be applied here. Whilst their Lordships of the plurality couched the principle in varying terms, the principle identified in *Woolwich* is that monies paid pursuant to an ultra vires tax is prima facie recoverable as of right,[40] in the sense that no conventional unjust factor must be pointed to support the claim in unjust enrichment.[41] The House of Lords in *Deutsche Morgan Grenfell v Inland Revenue* [2006] UKHL 49 clarifies that the "decision itself added another" unjust factor.[42]

64. Support for the submissions of the appellant Woolwich (albeit not decisive support) was sourced in Australian jurisprudence: the judgment of O'Connor J in *Sargood Brothers v*

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[36] *BAT* at [15], per Gleeson CJ; [40], per McHugh, Gummow and Hayne JJ; Kirby J in dissent in *BAT* identified the right to relief stemming from the infringement of the prohibition in the Constitution: *BAT* at [127]-[129], [131] and [134]. In *Kruger v Commonwealth* (1997) 190 CLR 1 at 46-47, per Brennan CJ; 93, per Toohey J; 147, per Gummow J, the Constitution was said not to create private rights enforceable directly by an action for damages; a common law right of action was required.

[37] *Kingstreet Investments* at [31] and [34].

[38] *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 168, per Kirby J; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 341, per Kirby J; *Brown v West* (1990) 169 CLR 195 at 205; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 581, per Brennan J; *Commonwealth and Central Wool Committee v Colonial Combing, Spinning & Weaving Company* (1922) 31 CLR 421 at 433-434, per Isaacs J; *BAT* at 67, per Kirby J citing *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 69, per Mason CJ; *Combet v Commonwealth of Australia* (2005) 224 CLR 494 at 535, per McHugh J.

[39] *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 69, per Mason CJ.

[40] *Woolwich* at 172-173, per Lord Goff; 198, per Lord Browne-Wilkinson; 204, per Lord Slynn; *Redland City Council v Kozik* [2022] QCA 158 at [47]; *Hollis v Atherton Shire Council* (2003) 128 LGERA 348 at [44]; *Prygodicz v Commonwealth (No 2)* [2021] FCA 634 at [146]; *Lamesa Holding BV v Commissioner of Taxation* (1999) 92 FCR 210 at [84]; *Chippendale v Commissioner of Taxation* (1996) 62 FCR 347 at 355; *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 67-68; *Esso Australia Resources Ltd v Gas & Fuel Corporation of Victoria* [1993] 2 VR 99 at 107-108.

[41] *Vodaphone Ltd v Ofcom (QBD)* [2020] QB 229, at [42], per Adrian Beltrami QC; *Vodaphone Ltd v Ofcom (CA)* [2020] QB 857 at [90], per Sir Geoffrey Vos C; [109], per Underhill LJ.

[42] 569 [21] per Lord Hoffman; 576 [41] per Lord Hope; 590 per Lord Scott; 612-613 per Lord Walker.

*The Commonwealth* (1910) 11 CLR 258 (in finding that customs duty paid under proposed legislation which never came into force was recoverable as demanded colore officii and paid under duress: at 276-277); and the judgments of Dixon CJ and Kitto J in *Mason v New South Wales* (1959) 102 CLR 108 (***Mason***). In *Mason*, at 117, Dixon CJ expressed doubt that recovery was limited to traditional grounds; Kitto J arguably went further by identifying that there was sufficient compulsion from the legislation itself to warrant restitution (at 129).

65. Significantly, the *Woolwich* principle accords with myriad decisions of this court that, even assuming unjustness must be found, it is to be found in the breach of the Constitution: as already identified, the result in *Woolwich* is in accord with the decisions of Dixon CJ and Kitto J in *Mason*; in *Antill*, Fullagar J (in considering a claim for moneys had and received to the State's use under a law that infringed s 92 of the Constitution) identified that an essential element of the claim was the unlawful exaction, noting at 88: "It depends on the Constitution"); in *McClintock v Commonwealth* (1947) 75 CLR 1, Williams J considered the terms of the act in question to establish compulsion;[43] in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (***Royal Insurance***), Mason CJ identified (at 66-67) the possibility that the lack of a legitimate basis for the Commissioner to retain the amounts "might itself ground a claim for unjust enrichment without the need to show any causative mistake on the part of Royal";[44] and in *BAT*, their Honours McHugh, Gummow and Hayne JJ held that the unjust factor was the unlawful exaction of an excise contrary to s 90 of the Constitution: at 52 [39]-[42].[45]

66. The *Woolwich* principle has also been favourably acknowledged by the Federal Court of Australia,[46] with other courts predicting its adoption by this Court.[47] Further, it has had favourable treatment by leading academics and in extrajudicial writings.[48]

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[43] *McClintock v Commonwealth* (1947) 75 CLR 1 at 40, per Williams J, citing Abbott CJ in *Morgan v Palmer* (1824) 2 B & C 729 at 735. In *Mason* at 146, Windeyer J described the judgment of Williams J as "forceful".
[44] See also in *Royal Insurance* at 89 per Brennan, Toohey and McHugh JJ; and at 99 per Dawson J.
[45] Their Honours at [42] referring to the statement by Fullagar J in *Antill* at 102-103.
[46] *State Bank of New South Wales v Commissioner of Taxation* (1995) 62 FCR 371 at 378, per Wilcox J; *Chippendale v Commissioner of Taxation* (1996) 62 FCR 347 at 366, per Lehane J; *SCI Operations Pty Ltd v Commonwealth* (1996) FCR 346 at 378, per Beaumont and Einfeld JJ; 397, per Sackville J; *Prygodicz v Commonwealth (No 2)* [2021] FCA 634 at [145]-[148].
[47] *Kozik v Redland City Council* [2019] QSC 109 at [29]-[30]; *Redland City Council v Kozik* [2022] QCA 158 at [47]; *Meriton Apartments v Council of the City of Sydney (No 3)* (2011) 80 NSWLR 547 at [157]; *BAT* at [39]; *Hollis v Atherton Shire Council* (2003) 128 LGERA 348; *Mid Brisbane River Irrigators Inc v The Treasurer and Minister for Trade (Qld) (No 2)* [2014] QSC 197 at [20].
[48] *Woolwich* has been welcomed almost universally by judicial and academic commentators in the United Kingdom but it has had a mixed reception internationally: Mason, Carter & Tolhurst, *Restitution Law in Australia* (2nd ed 2008) at [2019]. Commentators have suggested that there is no apparent reason why Australian courts ought not to apply *Woolwich* in the appropriate case: *Ibid*. See also: Derek Wong, "The High Court and the *Woolwich* Principle:

67. Even accepting that s 114 does not confer a private right on the plaintiff, it confers an immunity from Commonwealth tax on property of a State. Analogous to the way in which s 92 provides immunity from Commonwealth interference with trade or commerce between States,[49] s 114 provides States (including the plaintiff) with immunity from Commonwealth taxation on its property.[50] It would defeat s 114 for the immunity to arise only on proof of criteria above the breach of the Constitution. To identify hurdles for recovery (beyond the unconstitutionality of the tax paid) would be, in effect, to treat the tax as being lawfully exacted; corresponding to the position that would have been obtained had the Barring Act the subject of *Antill*, which sought to extinguish government liability for breach of s 92 of the Constitution, been valid.

68. The third basis on which the plaintiff submits it is entitled to restitution is that the circumstances identified at paragraph 59 above are sufficient to ground relief under the common law of moneys had and received. As observed by Lord Slynn in *Woolwich*, the position of the parties in relation to the unlawfulness of the demand "shades into" the existing principles of duress and colore officii (at 204E). Notably, the principles governing money exacted under colore officii have been held to apply equally to that exacted under the colour of the Act.[51] The unequal position of the Commonwealth vis-a-vis the plaintiff in requiring the withholding, from the grant to which the plaintiff is otherwise entitled, any notional GST not paid by the plaintiff can be seen to fall within the existing principles of compulsion described by Lord Browne-Wilkinson in *Woolwich* at 164-165 and Williams J in *McClintock v The Commonwealth* (1947) 75 CLR 1 at 40.

69. In the premises, the payment of the notional GST in respect of the vehicle was an involuntary payment demanded and received (under protest) by the Commonwealth under

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Adoption or Another Bullet That Cannot Be Bitten?' (2011) 85 *Australian Law Journal* 597; Simone Degeling, 'Restitution of Unlawfully Exacted Tax in Australia: The *Woolwich* Principle' in Steven Elliott, Birke Hacker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) 313; Margaret Brock, 'Restitution and Invalid Taxes – Principles and Policies' (2000) 5 *Deakin Law Review* 127, 134-140. James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Bloomsbury Publishing 2016); K. Mason, J.W. Carter, and G. Tolhurst, *Mason & Carter's Restitution Law in Australia* (3rd edn, LexisNexis Butterworths 2016), 792-805; Greg Weeks, 'The Public Law of Restitution' (2014) 38 *Melbourne University Law Review* 198; Tania Voon, 'Restitution from government in Australia: Woolwich and its necessary boundaries' (1998) 9(1) *Public Law Review* 15.

[49] *Antill* at 100, per Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ: "When s. 92 says that trade, commerce and intercourse among the States shall be free, it gives an immunity from interference by governmental action that cannot be transient or illusory."

[50] *Queensland v The Commonwealth* (1987) 162 CLR 74 at 87-88, per Gibbs CJ.

[51] *Mason* at 134, where Menzies J held that payments made under "colour of the Act" were subject to the same principles as payments exacted under colore officii.

colour of Commonwealth statutory provisions which were in violation of the prohibition in s 114 of the Constitution. The plaintiff is accordingly entitled to repayment with interest.

70. The plaintiff claims interest on the $3,182 payment pursuant to s 77MA(1) of the *Judiciary Act 1903* (Cth) at such rate as the Court thinks fit for the period from 15 July 2022 (being the date on which the notional GST of $3,182 was paid to the Commonwealth and the cause of action for restitution arose)[52] to the date of judgment. The appropriate rate is the rate generally applied for the purposes of the identical provision s 51A(1) of the *Federal Court of Australia Act 1976,* namely the rate provided in the Federal Court's *Interest on Judgments Practice Note* (GPN-INT), which is currently 4.85%.

10 **Conclusion**

71. The questions of law set out in the special case should be answered as follows:

(1) Yes. Items 16, 17 and 18 of Sch 1 to the *Local Government (Financial Assistance) Amendment Act 2000* (Cth) are each invalid.

(2) Yes. Items 16, 17 and 18 of Sch 1 to the *Local Government (Financial Assistance) Amendment Act 2000* (Cth), and ss 6(3)(a)(ii) and 6(3)(c) of the *Federal Financial Relations Act 2009* (Cth) are each invalid and ss 4 and 5 of the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) are inoperable.

(3) The plaintiff is entitled to be repaid by the Commonwealth the $3,182 notional GST it paid under protest in respect of its sale of the vehicle on 24 May 2022 plus interest.

20 (4) The defendants should pay the plaintiff's costs of the special case.

72. In the event that any of questions 1 to 3 of the special case are answered in favour of the plaintiff, the plaintiff seeks an order under s 44 of the *Judiciary Act 1903* (Cth) that this matter be remitted to the Federal Court of Australia and that further proceedings related to the plaintiff's amended writ of summons shall be as directed by the Federal Court.

Dated: 31 October 2022

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[52] Goff & Jones, *The Law of Restitution*, 5 Ed p 848; Mason & Carter, *Restitution Law in Australia*, [2721].