HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ

HORNSBY SHIRE COUNCIL PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ANOR DEFENDANTS

Hornsby Shire Council v Commonwealth of Australia
[2023] HCA 19
Date of Hearing: 18 & 19 April 2023
Date of Judgment: 14 June 2023
S202/2021

ORDER

The questions stated by the parties for the opinion of the Full Court in the special case filed on 6 September 2022 should be answered as follows:

Question 1: *Are any of items 16, 17 or 18 of Sch 1 to the* Local Government (Financial Assistance) Amendment Act 2000 *(Cth) invalid in whole or in part on the ground that they purported to introduce a law imposing taxation into an Act that deals with matters other than taxation, contrary to s 55 of the* Constitution*?*

Answer: *Unnecessary to answer.*

Question 2: *Do any, or any combination, of the provisions comprising ss 6(8), 11(3), 14(3), 15(aa) and 15(c) of the* Local Government (Financial Assistance) Act 1995 *(Cth), ss 6(3)(a)(ii) and 6(3)(c) of the* Federal Financial Relations Act 2009 *(Cth) and ss 4 and 5 of the* Intergovernmental Agreement Implementation (GST) Act 2000 *(NSW) impose a tax on property belonging to the plaintiff, contrary to s 114 of the* Constitution *and, if so, which provisions (if any) are invalid or inoperable?*

Answer: *None do so, in combination or otherwise.*

Question 3: *What relief, if any, should be granted to the plaintiff in respect of the payment under protest of notional GST with respect to the sale of the plaintiff's vehicle on 24 May 2022?*

Answer: *None.*

Question 4: *Who should pay the costs of the special case?*

Answer: *The plaintiff.*

Representation

R L Seiden SC with M A Robinson SC, E Bishop SC, W R Johnson and D A Woods for the plaintiff (instructed by Diamond Conway Lawyers)

S P Donaghue KC, Solicitor-General of the Commonwealth, with G A Hill SC, A Lord and M A Jackson for the first defendant (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with M O Pulsford for the second defendant (instructed by Crown Solicitor's Office (NSW))

J A Thomson SC, Solicitor-General for the State of Western Australia, with S J K Teoh for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

M J Wait SC, Solicitor-General for the State of South Australia, with P J M Leeson for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

R J Orr KC, Solicitor-General for the State of Victoria, with M-Q T Nguyen for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor's Office)

G J D del Villar KC, Solicitor-General of the State of Queensland, with K J E Blore for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

CATCHWORDS

Hornsby Shire Council v Commonwealth of Australia

Constitutional law (Cth) – Taxation – Where Commonwealth makes grants to States for local government purposes under *Local Government (Financial Assistance) Act 1995* (Cth) ("Local Government Assistance Act") – Where States agreed that local government would make "notional GST" payments notwithstanding prohibition in s 114 of *Constitution* against Commonwealth imposing tax on State property – Where s 15(aa) of Local Government Assistance Act provided as a condition on grants of financial assistance that States withhold from local governing bodies amounts representing notional GST payments that should have, but have not, been paid by those bodies – Where s 15(c) of Local Government Assistance Act provided that where State failed to comply with s 15(aa), State must repay to Commonwealth amount not more than amount which State failed to pay – Where plaintiff, a local government body, paid notional GST arising from sale of vehicle under protest – Whether notional GST was tax on State property contrary to s 114 of *Constitution*.

Words and phrases – "Business Activity Statement", "circuitous device", "compulsory exaction", "condition", "financial assistance", "forced benevolence", "goods and services tax", "grants", "GST legislation", "GST revenue", "Intergovernmental Agreement", "legal compulsion", "liability", "local government", "notional GST", "practical compulsion", "tax", "taxable supply", "voluntary act".

Constitution, ss 96, 114.
A New Tax System (Commonwealth-State Financial Arrangements) Act 1999 (Cth), s 10.
A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 177-3.
Federal Financial Relations Act 2009 (Cth), ss 5, 6(3)(a)(ii), 6(3)(c), 17.
Intergovernmental Agreement Implementation (GST) Act 2000 (NSW), ss 4, 5.
Local Government (Financial Assistance) Act 1995 (Cth), ss 6(8), 9, 11, 14(3), 15(a)(i), 15(aa), 15(c).

1 KIEFEL CJ, GAGELER, GORDON, EDELMAN, STEWARD, GLEESON AND JAGOT JJ. On 24 May 2022, the Hornsby Shire Council ("the Council"), a New South Wales local government body, sold a car at an auction. The proceeds of sale, less the costs of the auction, amounted to $34,601.80. A tax invoice, prepared by the auctioneers, reported these proceeds as comprising an amount, described as "Excl GST", being $31,818.18, and another amount, described as "GST", being $3,181.82. The latter amount ($3,181.82) is referred to in this judgment as the "notional GST" on the sale of the vehicle. 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 the notional GST in the field "GST on sales". That BAS, as a deemed assessment[1], resulted in a liability to pay goods and services tax ("GST") for that month in the sum of $3,146, which reflected the inclusion of the notional GST. The Council paid this sum under protest. In essence that protest was that the GST liability arising from the inclusion in its BAS of notional GST was a "tax on property ... belonging to" the State of New South Wales for the purposes of s 114 of the *Constitution* and that, accordingly, certain laws relating to its payment ("the impugned laws"), which are described below, were invalid.

2 The Council sued the Commonwealth and New South Wales in the original jurisdiction of this Court. The parties prepared a special case that posed for consideration by this Court the following four questions:

(1) Are any of items 16, 17 or 18 of Sch 1 to the *Local Government (Financial Assistance) Amendment Act 2000* (Cth) ("the Local Government Assistance Amendment Act") invalid in whole or in part on the ground that they purported to introduce a law imposing taxation into an Act that deals with matters other than taxation, contrary to s 55 of the *Constitution*?

(2) Do any, or any combination, of ss 6(8), 11(3), 14(3), 15(aa) and 15(c) of the *Local Government (Financial Assistance) Act 1995* (Cth) ("the Local Government Assistance Act"), ss 6(3)(a)(ii) and 6(3)(c) of the *Federal Financial Relations Act 2009* (Cth) ("the Financial Relations Act") and ss 4 and 5 of the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) ("the Implementation Act") impose a tax on property belonging to

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1 *Taxation Administration Act 1953* (Cth) ("TAA"), s 155-15 of Sch 1.

the Council, contrary to s 114 of the *Constitution* and, if so, which provisions (if any) are invalid or inoperable?

(3) What relief, if any, should be granted to the Council in respect of the payment under protest of notional GST with respect to the sale of the Council's vehicle on 24 May 2022?

(4) Who should pay the costs of the special case?

3 The Council ultimately did not pursue the issue concerning s 55 of the *Constitution* on the basis that this question turned on the answer to question 2, namely whether the provisions introduced by the Local Government Assistance Amendment Act imposed a tax. Moreover, during the course of argument, the Council effectively limited its attack on the impugned laws to only ss 15(aa) and 15(c) of the Local Government Assistance Act. Nonetheless, to understand that attack requires a broader consideration of the statutory context. This is set out below.

4 For the reasons which follow, 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 Commonwealth and each State and Territory, initially in 1999 and again in 2009[2]. No federal law compelled or obliged the Council to include that notional GST in its BAS. Sections 15(aa) and 15(c) of the Local Government Assistance Act are not a tax for the purposes of s 114 of the *Constitution* and the Council is not entitled to any relief. Since those provisions are not a tax, it is unnecessary to consider the consequential question, which could only arise if they were a tax, whether the conditions in ss 15(aa) and 15(c) contravened s 114 of the *Constitution*.

5 Whilst the special case concerned only the sale of one car by the Council, the following reasoning would apply to any local government body that also chose to include, in any BAS, notional GST in the circumstances described below.

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2 This Agreement was entered into on 29 November 2008 and came into operation on 1 January 2009. Given that the special case referred to that Agreement as "the 2009 Agreement", the same expression has been adopted in these reasons for consistency.

The Intergovernmental Agreements

6 In 1995, the Council of Australian Governments agreed on a "Competition Principles Agreement", whereby the Commonwealth, States and Territories agreed that where a government agency undertook significant business activities as part of a broader range of functions, any price charged for goods and services would take into account, where appropriate, full Commonwealth, State and Territory taxes or tax equivalent systems. An application of this Agreement was recently considered by this Court in *Hobart International Airport Pty Ltd v Clarence City Council*[3].

7 In 1999, the Commonwealth and all States and Territories entered into an "Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations". Under this Agreement, the Commonwealth undertook to legislate to provide all of the revenue from the GST[4] to the States and Territories. As part of this fiscal arrangement, the parties to the Agreement intended that the Commonwealth, the States, the Territories and local government, and their statutory corporations and authorities, would operate "as if" they were all subject to the "GST legislation", and would make "voluntary or notional payments where necessary", notwithstanding, amongst other things, the prohibition in s 114 of the *Constitution* against the Commonwealth imposing tax on the property of a State. Clauses 17 and 18 of this Agreement provided as follows:

> "17. The Parties intend that the Commonwealth, States, Territories and local government and their statutory corporations and authorities 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 input tax credits in the same way as non-Government organisations. All such payments will be included in GST revenue.

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3 (2022) 96 ALJR 234; 399 ALR 214.

4 As imposed by *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); *A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999* (Cth).

> 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. Detailed arrangements will be agreed by the Ministerial Council on advice from Heads of Treasuries."

8 Clause 18 provided for the Commonwealth to pass legislation which would require a State to withhold from any local government authority amounts representing any voluntary or notional GST which the authority has failed to pay the Commonwealth in "breach of Clause 17". Presumably, this was intended to give a local government authority an incentive to pay notional GST. As described below, the Commonwealth did pass specific amending legislation to give effect to cl 18 of the 1999 Intergovernmental Agreement.

9 In 2009, a further version of the 1999 Intergovernmental Agreement was entered into by the Commonwealth, States and Territories. Clause A28 of Sch A to the 2009 "Intergovernmental Agreement on Federal Financial Relations" is in substantially the same form as cl 17 of the 1999 Intergovernmental Agreement, set out above. There is, however, no equivalent to cl 18 of the 1999 Intergovernmental Agreement. Inferentially, that is because the Commonwealth, by 2009, had already passed the legislation contemplated by that clause. That legislation is described below.

10 It was not in dispute that the 1999 and 2009 Intergovernmental Agreements were not intended to create legally enforceable rights and obligations as between the Commonwealth, the States and the Territories. Each Agreement is a political arrangement which sets out the fiscal relationship between the parties with respect to the revenue raised by the Commonwealth from the GST legislation[5].

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5 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 140-141 per Dixon CJ (with whom Kitto J agreed), 148-149 per McTiernan J, 149 per Taylor J, 150 per Menzies J, 153-154 per Windeyer J, 157 per Owen J; *Bob Brown Foundation Inc v The Commonwealth* (2021) 283 FCR 225 at 236-237 [47]-[48] per Griffiths, Moshinsky and S C Derrington JJ.

Implementation of the Intergovernmental Agreements

11 Both the Commonwealth and, relevantly, New South Wales enacted legislation to implement what had been agreed in the Intergovernmental Agreements. The Commonwealth enacted the *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth) ("the Financial Arrangements Act") as well as the Local Government Assistance Amendment Act. Section 10(1) of the former Act refers to the 1999 Intergovernmental Agreement and provides for it to be reproduced in Sch 2. Section 10(2) provides that it is the intention of the Commonwealth to comply with, and give effect to, the Agreement. Section 13 provides that each State is entitled to the payment, by way of financial assistance, of a grant worked out pursuant to a formula for the distribution of all GST revenue. The Local Government Assistance Amendment Act is described below.

12 In 2009, the Commonwealth enacted the Financial Relations Act, which provides more generally for the provision of financial assistance to the States. It gave effect to the 2009 Intergovernmental Agreement. The provision for the Commonwealth to distribute "GST revenue" to the States is now found in the Financial Relations Act[6]. The term "GST revenue" includes amounts of notional GST paid to the Commonwealth[7]. It also includes amounts of notional GST that "should have, but have not, been paid by local government bodies"[8].

13 Each of the foregoing Acts was authorised by s 96 of the *Constitution*. Much argument took place about the relationship between that provision and s 114 of the *Constitution*. Because notional GST is not a tax imposed by the Commonwealth, it is not necessary to resolve that issue. However, four matters should be noted. First, it is well established that the power to grant financial assistance to the States is "susceptible of a very wide construction" and is non-coercive in nature[9]. Secondly, grants may be made subject to the fulfilment of conditions by the State[10]. Thirdly, any conditions must be consistent with the

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6 Financial Relations Act, ss 5 and 17.

7 Financial Relations Act, s 6(3)(a)(ii).

8 Financial Relations Act, s 6(3)(c).

9 *Victoria v The Commonwealth* (1957) 99 CLR 575 at 605 per Dixon CJ.

10 *Victoria v The Commonwealth* (1957) 99 CLR 575 at 605-606 per Dixon CJ.

Constitution, including express prohibitions contained in s 116 or s 51(xxxi)[11]. And, finally, States are free not to accept any grant. As Dixon CJ said in *Victoria v The Commonwealth*[12]:

> "It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition."

14 Two further federal enactments should be noted. First, each of the three principal Acts which impose the GST ("the GST Imposition Acts") expressly provide that the GST is not imposed on property belonging to a State[13]. The GST Imposition Acts thus each contain the following provision in s 5:

> "(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 same meaning as in section 114 of the Constitution."

15 Secondly, the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act") contains the provisions relating to the determination of liability to pay GST, and for the administration and machinery relating to the imposition of GST. It contains provisions[14] whereby a person may be entitled to an input tax credit for the purchase of a supply from an "Australian government agency" where that agency has included an amount relating to its notional liability for GST in the

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11 *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 593 per Gibbs J; *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 167-168 [35]-[36] per French CJ, Gummow and Crennan JJ.

12 (1957) 99 CLR 575 at 605.

13 *A New Tax System (Goods and Services Tax Imposition – General) Act 1999* (Cth), s 5; *A New Tax System (Goods and Services Tax Imposition – Customs) Act 1999* (Cth), s 5; *A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999* (Cth), s 5. See also *A New Tax System (Goods and Services Tax) Act 1999* (Cth), s 2-1.

14 GST Act, ss 11-20 and 177-3.

consideration for that supply. An "Australian government agency" includes the Council[15]. Thus, s 177-3 of the GST Act provides:

> "If:
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> (a) an *Australian government agency, other than the Commonwealth or an *untaxable Commonwealth entity, makes a supply to another entity; and
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> (b) the agency is not liable for GST on the supply, but an amount relating to the agency's notional liability for GST on the supply is included in the *consideration for the supply;
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> the *GST law applies in relation to the other entity as if:
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> (c) the supply were a *taxable supply to that entity; and
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> (d) the amount of GST for which the agency is notionally liable on the supply is the amount of GST payable on the supply."

16 The foregoing provision recognises that when an Australian government agency includes the agency's notional liability for GST in the consideration for a supply made by it, the word "notional" reflects the fact that the agency is not actually liable to pay GST.

17 In response to the 1999 Intergovernmental Agreement, the New South Wales Parliament enacted the Implementation Act. Like s 10 of the Financial Arrangements Act, s 4(1) provides that a copy of the 1999 Intergovernmental Agreement is set out in Sch 1 to that Act, and s 4(2) provides that the State intends to comply with, and give effect to, that Agreement. Section 5 of the Implementation Act is important to the scheme for the payment of notional GST. It provides:

> "A State entity may pay to the Commissioner of Taxation amounts representing amounts that would have been payable for GST if:

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15 *Income Tax Assessment Act 1997* (Cth), s 995-1; GST Act, s 195-1.

(a) the imposition of that GST were not prevented by section 114 of the Commonwealth Constitution, and

(b) section 5 of each of the GST Imposition Acts had not been enacted,

and may do things of a kind that it would be necessary or expedient for it to do if it were liable for that GST."

18 The term "State entity" is defined in s 3 of the Implementation Act in a way which would include a local government body, such as the Council.

19 Section 5 does not, by its terms, create any obligation to pay GST or to make any other payment to the Commonwealth. It uses only permissive language. A State entity "may" pay the Federal Commissioner of Taxation "amounts". The amounts are not GST, but sums that represent amounts that would have been payable under the GST legislation, but for s 114 of the *Constitution* and s 5 of each of the GST Imposition Acts. And a State entity "may" do things which would be necessary or expedient if it had been liable for GST. Section 5 thus permits or authorises a State entity, such as the Council here, to include amounts of notional GST in a BAS, and to pay any resulting liability to the Commissioner of Taxation. Again, s 5 recognises that a State entity, such as the Council, may make payments to the Commissioner of Taxation, and prepare and lodge a BAS, when it is not liable to pay GST.

Federal funding of local government

20 The Commonwealth also provides financial assistance to local government by making payments to the States for that purpose. In 1995, it enacted the Local Government Assistance Act. In 1999, the Commonwealth, the States and the Territories originally agreed that the States and Territories would take over the Commonwealth's funding of local government using part of the GST revenue. However, as a result of a reduced revenue base for the GST, it was decided that the Commonwealth would continue to fund local government.

21 Section 9 of the Local Government Assistance Act provides that each State is entitled to the payment, by way of financial assistance for local government purposes, of a general grant, calculated in accordance with a formula set out in the

provision[16]. This entitlement is made subject to s 11. Section 11 provides for a series of requirements, including the establishment of a "Local Government Grants Commission", which is to make recommendations with respect to the allocation of funds to local governing bodies and hold public hearings in connection with those recommendations, before any State may become entitled to payments under s 9. Sections 12 and 13 provide for the making of other types of grants, but they are not relevant to the special case. Section 15 specifies further conditions that a State must meet. Section 15(a)(i) imposes a condition that the State will, when grants are made under s 9, without undue delay make unconditional payments to local governing bodies in accordance with allocations determined under s 11. The enactment of these types of conditions, for the reasons already expressed, is permitted by s 96 of the *Constitution*.

22 The Local Government Assistance Amendment Act, referred to above, made amendments to the Local Government Assistance Act in order to implement the 1999 Intergovernmental Agreement, in particular cl 18 of that Agreement. Section 15(a)(i) was amended by making the condition that the State will make payments without undue delay subject to a new condition set out in s 15(aa). Section 15(aa) is in the following terms:

> "Payment of an amount to a State (other than the Australian Capital Territory) under this Act in respect of a year is subject to:
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> ...
>
> (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".

23 The foregoing "condition" is important to the Council's case. In general terms, it makes the receipt by a State of federal funding for local government purposes conditional upon the State's agreement to withhold funding from a local governing body where that body has failed to pay notional GST and, to the extent of that failure, to remit that sum back to the Commonwealth. The Council submits

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16 Subject to possible adjustment by s 10, which is not relevant to the special case.

that the phrase "GST payments that should have ... been paid by local governing bodies" is a reference to an obligation on those bodies to pay notional GST.

24 Section 15(c) contains a further relevant condition, namely that if the federal Minister tells the Treasurer of a State that, with respect to a given amount, 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 which the Minister is satisfied the State has failed to pay. The Council contends that s 15(c) supports s 15(aa) as an "enforcement mechanism". Finally, an amendment was made to s 11 by the Local Government Assistance Amendment Act to make it clear that any possibility of a reduction in the amount allocated to a local governing body because of s 15(aa) is to be disregarded for the purposes of that provision[17].

25 Importantly, the conditions and obligations sought to be imposed on a State by s 15 of the Local Government Assistance Act are only operative where the State agrees to accept funding from the Commonwealth. For the reasons already given, no State is obliged to accept such funding, and where a State chooses to reject funding under the Local Government Assistance Act there will be no occasion for any condition in s 15 to be engaged.

The Council

26 It is an agreed fact that since 1 July 2000, the Council has received payments made by the Commonwealth to New South Wales pursuant to the Local Government Assistance Act. The Council relies on these payments to fund capital and operating projects such as sporting ovals, grandstands or bridges, and for the maintenance of infrastructure. The payments comprise approximately two per cent of the Council's total revenue.

27 It is also an agreed fact that since 1 July 2000, the Council has been registered for GST under the GST Act[18]; that it carries on an "enterprise" for GST purposes[19]; that it has an annual turnover of over $2 million; and that it prepares

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17 See also Local Government Assistance Act, ss 6(8) and 14(3).

18 GST Act, Pt 2-5.

19 GST Act, s 9-20.

and lodges monthly a BAS that includes actual GST on services supplied by the Council, which are taxable supplies for the purposes of the GST Act[20], and notional GST on supplies of property which are not taxable supplies[21].

The dispute about application of a "tax" in s 114 of the *Constitution*

28 There was no dispute about what is a "tax" for the purposes of s 114 of the *Constitution*. A tax is a "compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered"[22]. It was not suggested that, when paid, notional GST is really a fee for services rendered or a charge for the use of property or that it is in the nature of a penalty[23].

29 What was in dispute was whether the payment of notional GST was a compulsory exaction enforceable by law. The Commonwealth and New South Wales, and all the intervening States, said that it was not; payment of notional GST was, it was contended, an entirely voluntary and political act. The Council disagreed. It contended that, as a matter of law, it was compelled to pay notional GST by reason of the regime applicable under the Local Government Assistance Act and, in particular, by the language of s 15(aa), when read with s 15(c), of that Act. Alternatively, it submitted that it was compelled to pay as a matter of law because New South Wales was required to collect and pay to the Commonwealth notional GST on the Council's behalf when the Council itself failed to pay notional GST. Further, and in addition, the Council submitted that because of the legislative regime established by the Local Government Assistance Act, it was practically

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20 GST Act, s 9-5.

21 GST Act, s 177-3.

22 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276 per Latham CJ, see also 290 per Dixon J. Cf *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 466-467 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ; *Luton v Lessels* (2002) 210 CLR 333 at 352-353 [49]-[51] per Gaudron and Hayne JJ.

23 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

compelled to pay notional GST, and that this amounted to a "forced benevolence", and thus a tax. The Council sought restitutionary relief.

Legal compulsion: voluntary GST payments that should have, but have not, been paid

30 As already mentioned, the Council relied upon the regime imposed by s 15(aa) of the Local Government Assistance Act and submitted that the phrase "voluntary GST payments that should have, but have not, been paid" was a recognition of an express liability to pay notional GST. In essence, it was said, the scheme established by the Local Government Assistance Act, and in particular by s 15(aa), when read with s 15(c), legally compelled the Council to pay notional GST as a condition of receiving federal funding.

31 The foregoing submission is misconceived. The Council could not identify any Act which imposed upon it a liability to pay notional GST. Indeed, as already mentioned, the GST Imposition Acts expressly provide for the opposite conclusion in respect of actual GST. And whilst s 15(aa) does create a condition for the payment of local government grants, and whilst it also creates an obligation on the State both to withhold funds, and to have them remitted to the Commonwealth, where notional GST has not been paid, it imposes no obligation or duty on any local governing body. Rather, the phrase "voluntary GST payments that should have, but have not, been paid" is a reference to a failure to comply with the arrangement described in cll 17 and 18 of the 1999 Intergovernmental Agreement, which, the parties agreed, being essentially political in nature, did not by itself give rise to enforceable rights. The use of the word "should", rather than "must", reflects the absence of any enforceable obligation on any local governing body, such as the Council here, and is consistent with compliance with a purely political arrangement. The Council "should" pay notional GST, but it may choose not to, in which case the obligation on the State to withhold funding becomes engaged. It follows that s 15(aa) of the Local Government Assistance Act does not impose any legal compulsion on the Council to pay notional GST. Section 15(c) takes the Council's case no further.

32 It is also important to observe that any condition or obligation imposed on a State by ss 15(aa) and 15(c) of the Local Government Assistance Act to make a payment to the Commonwealth (when notional GST has not been paid) is quite unlike a tax in the sense described above. Such conditions or obligations are only enlivened when the State agrees to accept funding for local government under that Act. However, the State always remains free to refuse to accept such funding.

When it makes this choice, the conditions in s 15(aa) can never become operative. This case does not address the question of whether conditions or obligations attached to a grant under s 96 of the *Constitution* are legally enforceable by the Commonwealth against a State.

Legal compulsion: New South Wales' obligation to withhold funding

33 As set out above, s 15(aa) of the Local Government Assistance Act provides that in a case when a local governing body does not pay voluntary GST payments, the relevant State "will withhold the amount and pay it to the Commonwealth". The Council submitted that this was equivalent to the remittal of Pay As You Go tax by an employer in the discharge of an employee's liability to pay income tax on his or her salary[24], drawing an analogy to *Deputy Commissioner of Taxation v Woodhams*[25]. Again, the submission is misconceived. It assumes that the Council has an actual liability to the Commonwealth that New South Wales must discharge when notional GST is not paid. For the reasons set out above, there is no such liability. Any obligation on the part of New South Wales to remit funds to the Commonwealth pursuant to s 15(aa) arises not from any obligation to pay on the part of the Council, but from the Council's choice not to pay notional GST, inconsistently with the 1999 and 2009 Intergovernmental Agreements. And again, it will only ever arise when New South Wales agrees to accept funding under the Local Government Assistance Act. In that sense, the obligation to withhold is one which is dependent upon both the choice of the local governing body and the voluntary receipt by New South Wales of federal funding.

Practical compulsion: forced benevolence

34 It was next submitted that because New South Wales is required to withhold federal funding in the same amount as the notional GST that the Council should have paid but did not, the Council is practically compelled to pay notional GST. That practical compulsion, it was said, is sufficient to characterise the payment as a tax. The Council relied upon the decision of this Court in *Attorney-General (NSW) v Homebush Flour Mills Ltd*[26]. In that case, millers were obliged to sell

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24 TAA, Pt 2-5 of Sch 1.

25 (2000) 199 CLR 370.

26 (1937) 56 CLR 390.

flour to New South Wales at one price (called the "fair and reasonable price"), and then had the opportunity to repurchase, by agreement, that flour at a greater price (called the "standard price"). Millers who sold their flour to anyone else were taken to have repurchased that flour from the State. If they otherwise failed to repurchase the flour from the State, they could only then recover the lesser of the price realised for the sale of flour by the State, at a time chosen by it, or the fair and reasonable price, subject to deductions for loss or deterioration. The difference in the fair and reasonable price and the standard price was used by the State to fund the relief of necessitous wheat farmers. As a practical reality, millers paid the State only that net difference. This sum was held to be a duty of excise imposed by New South Wales contrary to s 90 of the *Constitution*[27].

35 In *Homebush*, it was argued that the difference in price paid by the millers was no tax, but instead was the product of an agreement freely entered into by millers with the State. The Court rejected this argument. Latham CJ expressed the applicable principle as follows[28]:

> "'Voluntary loans' and 'gracious offerings' and 'forced benevolences' are not unknown in our history. When such transactions amount to the exaction of money by a government in obedience to what is really a compulsive demand, the money paid is paid as a tax."

36 The arrangement considered in *Homebush* practically forced the millers to repurchase the flour they had milled at the greater price. If they did not, they would go out of business. The choice as to whether or not to repurchase the flour at the greater price was thus "illusory". Latham CJ described this scheme in the following terms[29]:

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27 *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 at 400-401 per Latham CJ, 406 per Rich J, 408 per Starke J, 414 per Dixon J, 419 per Evatt J, 421-422 per McTiernan J.

28 *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 at 400 per Latham CJ (citations omitted).

29 *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 at 399-400.

> "But it is objected that the Act does not involve any imposition of taxation because a miller has an option of not paying money to the Government. If a miller does not repurchase his flour from the Crown – or if he is not 'deemed' so to have done by dealing in it – he does not pay the difference between the 'fair and reasonable price' and the 'standard price.' In that event the Government receives no money, and it cannot be said that any tax is exacted. An examination of the Act, however, shows that the option is quite illusory. A miller cannot sell his flour without being deemed to repurchase it (sec 6(3)). Accordingly, if he does not repurchase it, so as to become liable for the difference in the two prices, he must go out of business. Even if he obtained other flour than that which he gristed the Minister could acquire that flour under sec 4. If he does not repurchase his flour he can recover only the fair and reasonable price or the amount actually realized, whichever is the lesser amount (sec 6(6)) at such future time as the Minister may select for disposing of the flour (sec 6(6)) subject to deductions for loss or deterioration, and in the meantime he must store the flour for nothing (secs 3(8) and 4(7)). It is obvious that it would not be practicable to conduct any flour mill upon such a basis."

37 The Council submitted that, like the millers in *Homebush*, it has no choice but to pay notional GST[30]. This was either because if it did not it would suffer a significant detriment or because the same amount would be taken from it. Either way, any choice not to pay was, it was said, also "illusory".

38 In both respects, the Council submitted that if it failed to pay notional GST there would be "detrimental consequences" because it would not receive the "full grant to which it was otherwise entitled". This, the Council contended, would force it to function at a "standard lower than the average standard of other local governing bodies" and with "less than it needs". Its ability to fund projects "would be compromised".

39 The premise that the Council was otherwise entitled to receive the full grant is to be rejected. The Council held no such entitlement. And absent compliance

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30 cf *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 at 399-402 per Latham CJ, 405 per Rich J, 408 per Starke J, 412-414 per Dixon J, 416-417 per Evatt J, 421 per McTiernan J.

with the conditions in s 15 of the Local Government Assistance Act, including s 15(aa), nor did the State.

40 Much of the factual basis relied upon for the Council's argument departed from the agreed facts of the special case[31] and could not even be justified as a permissible inference from those agreed facts[32]. But even if true, as conceded by senior counsel for the Council, a failure to pay notional GST did not result in any "dire consequences" for the Council. The position of the Council is quite unlike that of the millers. At most, funding provided by the Local Government Assistance Act accounts for only two per cent of the Council's revenue.

41 Moreover, and inferentially, the failure to pay notional GST would either result in a revenue neutral outcome for the Council or leave it better off. That is because a failure to pay, say, $10 of notional GST could only result in a reduction in federal funding in the same amount. However, and again inferentially, because it was agreed that any reduction in funding would only take place well after the failure to pay notional GST, and because the Council could retain the sum of $10 in the meantime, due to the time value of money it would probably be better off in not paying notional GST. As such, the withholding of funds is, if anything, a poor inducement to pay notional GST.

42 Attempts in argument to contend otherwise for the presence of real detriment – due to, for example, price-setting and elasticity in demand – rose, with respect, no higher than conjecture or fell well outside the agreed facts in the special case. The proposition that the Council had no choice but to pay notional GST is rejected.

43 Finally, the Council contended, albeit only very faintly in oral argument, that the combined operation of all the impugned laws – in the Local Government Assistance Act, the Financial Relations Act, and the Implementation Act – constituted a "circuitous device" by which the constitutional prohibition in s 114 was impermissibly circumvented. It is a basal principle that what the *Constitution* forbids directly cannot be achieved indirectly or by means of some circuitous

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31 Which was confined to a single transaction arising from the sale of a car.

32 *High Court Rules 2004* (Cth), r 27.08.5; cf *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 291-292 [9]-[12] per Kiefel CJ, Keane, Nettle and Edelman JJ.

device[33]. But no such device exists here. The Council has not identified any real, separate reason why if s 15(aa) does not impose a tax, the scheme as a whole does. As s 15(aa) of the Local Government Assistance Act does not impose a tax, no prohibition in the *Constitution* has thereby been avoided. The circuitous device contention is also rejected.

Relief

44 For the reasons given, as notional GST is a voluntary payment, and not a tax, it does not offend s 114. It follows that the Council is not entitled to any restitutionary relief, or any other relief. It should pay the costs of the Commonwealth and of New South Wales. The questions stated in the special case should be answered as follows:

(1) Are any of items 16, 17 or 18 of Sch 1 to the Local Government Assistance Amendment Act invalid in whole or in part on the ground that they purported to introduce a law imposing taxation into an Act that deals with matters other than taxation, contrary to s 55 of the *Constitution*?

Answer: Unnecessary to answer.

(2) Do any, or any combination, of ss 6(8), 11(3), 14(3), 15(aa) and 15(c) of the Local Government Assistance Act, ss 6(3)(a)(ii) and 6(3)(c) of the Financial Relations Act and ss 4 and 5 of the Implementation Act impose a tax on property belonging to the Council, contrary to s 114 of the *Constitution* and, if so, which provisions (if any) are invalid or inoperable?

Answer: None do so, whether in combination or otherwise.

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33 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349-350 per Dixon J; *Wragg v New South Wales* (1953) 88 CLR 353 at 387-388 per Dixon CJ; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 407 per Gibbs J; *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 283 per Deane J; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 173 per Mason CJ.

(3) What relief, if any, should be granted to the Council in respect of the payment under protest of notional GST with respect to the sale of the Council's vehicle on 24 May 2022?

Answer: None.

(4) Who should pay the costs of the special case?

Answer: The Council.