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

BETWEEN: **HORNSBY SHIRE COUNCIL**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

STATE OF NEW SOUTH WALES
Second Defendant

FIRST DEFENDANT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

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

PART II: STATEMENT OF ISSUES

2. The key issue raised by the Special Case is whether the provisions listed in Q(2) (or any of them) (SC [68], SCB 131) create a legal or practical compulsion to pay "notional GST" (as defined in [10] below), such that they purport to impose a Commonwealth tax on property belonging to the Plaintiff. The Commonwealth submits that they do not. The argument to the contrary erroneously equates the withholding by the State of a payment to the Plaintiff that it has no legal right to receive with a compulsory exaction of property.

3. There being no compulsory exaction of property, "notional GST" is not a tax. For that reason, no question of any contravention of s 55 or s 114 of the Constitution arises. Nor does any question as to the form of relief that would issue if notional GST were a tax.

PART III: NOTICES OF CONSTITUTIONAL MATTER

4. The Plaintiff has given two notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). No further notice is required.

PART IV: MATERIAL FACTS

5. The material facts are set out in the Special Case (SCB 118). That document provides no foundation for several factual claims made by the Plaintiff in support of its central assertion that it is "compelled" to pay notional GST. In particular, the Plaintiff's claim that, if it did not pay notional GST, it would be "forced to function with … less than it

needs" and that its "ability to fund capital and operating projects … would be compromised" (PS [38(c)]) should not be accepted. Nor should its claim that the State would engage in "further review or adverse action" if notional GST is not paid (cf PS [38(d)]). No facts support those claims.

PART V: COMMONWEALTH ARGUMENT

6. The laws imposing the GST[1] (**GST Imposition Acts**) expressly provide that GST is not imposed on any property of the State within s 114 of the Constitution. Specifically, s 5 of each of the GST Imposition Acts 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 same meaning as in section 114 of the Constitution." The Plaintiff's argument that "notional GST" (as defined in [10] below) is a tax, and is therefore contrary to s 114 of the Constitution, invites the Court to conclude that the GST scheme does the opposite of what it says. That invitation is inherently implausible, and should be declined.

A. INTERGOVERNMENTAL AGREEMENTS CONCERNING "NOTIONAL GST"

7. The concept of "notional GST" arises from a political agreement reached between the Commonwealth, the States and the Territories. That political agreement, which addressed the introduction of the GST and the system of Commonwealth financial assistance grants to the States, was initially contained in the 1999 Agreement (SCB 155-178). It is now contained in the 2009 Agreement (SCB 232-279).

8. ***1999 Agreement:*** The objectives of the 1999 Agreement included "the achievement of a new national tax system" in the form of the GST, the elimination of existing inefficient State taxes, the provision of all revenue from the GST to the States and Territories, and a relative improvement in the financial position of the States (cl 2).

9. Clause 7 of the 1999 Agreement provided that the Commonwealth would provide all GST revenue to States and Territories in the form of GST revenue grants (to be made to the

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[1] *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 3-1, 3-5(3) item 6, 195-1 (**GST Act**). GST is imposed by the *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); *A New Tax System (Goods and Services Tax Imposition (Recipients)—General) Act 2005* (Cth); *A New Tax System (Goods and Services Tax Imposition (Recipients)—Customs) Act 2005* (Cth) and *A New Tax System (Goods and Services Tax Imposition (Recipients)—Excise) Act 2005* (Cth).

States pursuant to s 96 of the Constitution [2]). The Commonwealth retained responsibility for the payment of assistance to local governments.[3] Those payments are separate from, and additional to, GST revenue grants (SC [42], SCB 126).

10. Clause 17 provided the parties "intend that the Commonwealth, States, Territories and local governments and their statutory corporations and authorities will operate as if they were subject to the GST legislation" and will make "voluntary or notional payments" in the same way as non-government entities (SCB 158). That is, the Commonwealth, States and Territories agreed that each level of government would participate in the GST system, including by voluntarily making payments in circumstances where they were not liable to pay actual GST by reason of the exclusion found in s 5 of the GST Imposition Acts (quoted in [6] above).[4] It is these payments that the Special Case identifies as "**notional GST**" (SC [17], SCB 121).

11. Clause 17 of the 1999 Agreement had two purposes. *First*, it reflected the parties' commitment to the "principle of equality of treatment"[5] embodied in their earlier agreement to achieving "competitive neutrality" between government and non-government entities.[6] In the earlier agreement, the Commonwealth, States and Territories agreed to ensure that government agencies charged a price for goods and services that took into account Commonwealth, State and Territory taxes or "tax equivalent systems"[7] and to assume responsibility for applying the principles of competitive neutrality to local government.[8] *Second*, cl 17 of the 1999 Agreement enabled the GST system to work as intended (as a value added tax, the burden of which is ultimately borne by the consumer),

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2 Grants of financial assistance to the Territories would be supported by s 122 of the Constitution, but the Commonwealth's power to make grants to Territories on conditions is not raised by the questions of law in the Special Case. For that reason, the balance of these submissions does not refer to s 122.

3 Pursuant to an earlier agreement on 9 April 1999, it was intended that the States and Territories would assume responsibility for the payment of financial assistance to local government. But as the result of a reduced revenue base for GST, the Commonwealth retained this responsibility (SCB 121 [14]-[15]).

4 That idea is captured in s 6(3)(a)(ii) of the *Federal Financial Relations Act 2009* (Cth), which includes within GST revenue "the payments made to the Commissioner of Taxation representing amounts of GST that would have been payable if the Constitution did not prevent tax from being imposed on property of any kind belonging to a State and section 5 of the GST Imposition Acts had not been enacted".

5 *TT-Line Co Pty Ltd v Federal Commissioner of Taxation (**TT-Line**)* (2009) 181 FCR 400 at [67] (Perram J).

6 Competition Principles Agreement (11 April 1995) (SCB 135-154; SC [12], SCB 120)).

7 Competition Principles Agreement (11 April 1995) cll 3(4)(b), 3(5) (SCB 136).

8 Competition Principles Agreement (11 April 1995) cl 7(1) (SCB 139). New South Wales issued a policy stating that local governments should include in their costs Commonwealth "taxation equivalents": NSW Government Policy Statement on the Application of National Competition Policy to Local Government (SCB 141-154; SC [13], SCB 120).

by ensuring that the interposition of a State in the supply chain did not disrupt the system of input tax credits on which the system depends.[9]

12. ***Position of local governments:*** In cl 17 of the 1999 Agreement, the States and Territories agreed that their local governments would pay notional GST "as if" they were subject to the GST legislation. Importantly, the Commonwealth, States and Territories also agreed, in cl 18, that the Commonwealth would legislate to require States to withhold from local governments that did not operate as if they were subject to the GST legislation "a sum representing the amount of unpaid voluntary or notional GST payments".

13. To give effect to the 1999 Agreement, the Commonwealth amended the *Local Government (Financial Assistance) Act 1995* (Cth) (**Local Government Financial Assistance Act**) and enacted the *Federal Financial Relations Act 2009* (Cth) (**Financial Relations Act**),[10] while New South Wales enacted the *Intergovernmental Agreement Implementation (GST) Act 2000 (NSW)* (**NSW Implementation Act**). These Acts are examined below.

14. ***2009 Agreement***: The position described above arising from the 1999 Agreement continues under the 2009 Agreement (Sch A, cl A28: SCB 248).

B. THE CONSTITUTIONAL AND LEGISLATIVE SCHEME

B.1 Constitutional provisions

15. ***Section 96:*** Section 96 of the Constitution empowers the Commonwealth Parliament to grant financial assistance to the States on such terms and conditions as Parliament thinks fit. That legislative power is susceptible of a very wide construction upon which few restrictions can be implied, it being a non-coercive power which contemplates voluntary arrangements with the States.[11] The only essential feature of a law made under s 96 is that Commonwealth money is placed in the hands of a State.[12] It is no objection that the

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9 *TT-Line* (2009) 181 FCR 400 at [66] (Perram J). See also *Landcom v Commissioner of Taxation* (2022) 114 ATR 639 (***Landcom***) at [28]-[32] (Thawley J).

10 Previously *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999* (Cth) (SC [18(a)], SCB 121).

11 *Victoria v Commonwealth* (1957) 99 CLR 575 (***Second Uniform Tax Case***) at 604-605 (Dixon CJ), 623 (McTiernan J), 630 (Williams J), 656 (Fullagar J).

12 *Second Uniform Tax Case* (1957) 99 CLR 575 at 607 (Dixon CJ); *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 (***DOGS Case***) at 592 (Gibbs J). Section 96 supports a law requiring a State to distribute the money to third parties: *Second Uniform Tax Case* (1957) 99 CLR 575 at 607 (Dixon CJ); *DOGS Case* (1981) 146 CLR 559 at 592 (Gibbs J); *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735 (***Moran***) at 761 (Latham CJ).

power is exercised for the purpose of persuading a State to do something that the Commonwealth itself could not do, because s 96 "says nothing about purpose".[13]

16. If the Commonwealth statute so provides, a failure by a State to comply with the terms and conditions of a s 96 grant may give rise to an obligation to repay the grant.[14] But that is merely to repay an amount that was voluntarily offered by the Commonwealth and voluntarily accepted by the State. The Commonwealth cannot compel a State to accept a grant, and therefore cannot compel a State to accept any accompanying condition.[15]

17. Acting under s 96 of the Constitution, the Commonwealth makes grants of financial assistance to States for local government purposes under the Local Government Financial Assistance Act and GST revenue grants under the Financial Relations Act (SC [6]-[9], SCB 119; Parts B.2 and B.3 below).

18. ***Section 114***: The Plaintiff contends that s 114 of the Constitution operates as a restriction on the Commonwealth's power under s 96 (PS [17]). Section 114 relevantly prohibits the Commonwealth from imposing "any tax on property of any kind belonging to a State". That is, it is relevantly a qualification on the Commonwealth's legislative power under s 51(ii),[16] being the Commonwealth's power with respect to Commonwealth taxation.[17] A "tax" is (relevantly) a compulsory exaction, enforceable by law.[18] A law passed pursuant to s 96 necessarily is not a compulsory exaction, and thus can derive no support from s 51(ii). Further, even if (as has not occurred) the Commonwealth were to make it a condition of a grant under s 96 that a State impose a tax upon its own property,[19] that would not intersect with s 114 for the simple reason that the resulting tax would be a State

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13 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 (***ICM***) at [36] (French CJ, Gummow and Crennan JJ); *South Australia v Commonwealth* (1942) 65 CLR 373 (***First Uniform Tax Case***) at 409-410 (Latham CJ); *DOGS Case* (1981) 146 CLR 559 at 592 (Gibbs J).

14 *Second Uniform Tax Case* (1957) 99 CLR 575 at 603, 610 (Dixon CJ), 642-643 (Webb J). On the enforceability of the obligations created by s 96 grants, see Cheryl Saunders, "Towards a Theory for Section 96: Part 2" (1988) 16(4) *Melbourne University Law Review* 699 at 711-724.

15 *First Uniform Tax Case* (1942) 65 CLR 373 at 417 (Latham CJ), 463 (Williams J); *Second Uniform Tax Case* (1957) 99 CLR 575 at 605 (Dixon CJ), 636 (Williams J), 642-643 (Webb J); *DOGS Case* (1981) 146 CLR 559 at 591-592 (Gibbs J).

16 *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 (***SGH***) at [46] (Gummow J).

17 See *Second Uniform Tax Case* (1957) 99 CLR 575 at 614 (Dixon CJ); *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630 at 646-647 (Dawson J).

18 See, eg, *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 276 (Latham CJ); *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97 at [36]-[37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

19 To be valid, such a tax would have to comply with s 90: see Anne Twomey, "Federal limitations on the legislative power of the States and the Commonwealth to bind one another" (2003) 31(3) *Federal Law Review* 507 at 523.

tax. For those reasons, a law granting financial assistance pursuant to s 96 cannot intersect with s 114. Further, to give s 114 an expansive interpretation so as to deny the Commonwealth and a State the ability to agree to particular arrangements "would be more likely to frustrate than to achieve the attainment of"[20] the object of s 114.

19. In endeavouring to establish that grants under s 96 are subject to s 114 of the Constitution, the Plaintiff refers to cases considering the relationship between s 96 and either s 51(xxxi) or s 116: PS [23]-[31]. However, those provisions are not relevantly analogous to s 114.

(a) Section 51(xxxi) is not confined to acquisitions of property by the Commonwealth. Hence a law providing for a s 96 grant that is linked to a process by which a State compulsorily acquires property might have the character of a law with respect to the acquisition of property within s 51(xxxi).[21] By contrast, however, s 51(xxxi) does not apply to any voluntary arrangement between the Commonwealth and a State regarding property of the State.[22]

(b) Section 116 operates by reference to the purpose of a Commonwealth law (whether it is "for" establishing a religion or prohibiting the free exercise of religion).[23] A grant of financial assistance is capable of having this prohibited purpose.[24] That provides no analogy to s 114, which in its terms applies only to coercive laws (thereby necessarily excluding laws enacted pursuant to s 96).

B.2 Local Government Financial Assistance Act

20. ***Objects (s 3):*** In reliance upon s 96 of the Constitution, the Parliament enacted the Local Government Financial Assistance Act, which provides the framework for Commonwealth grants of financial assistance to the States for local government purposes. The objects of the Act include to provide financial assistance to the States for the purposes of improving, amongst other things, the financial capacity of local governing bodies (s 3(2)(a)).

21. ***General local government grant (s 9):*** The Act creates an entitlement to two types of grants for local government purposes (general purpose grants and additional funding)

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20 Cf *Deputy Commissioner of Taxation v State Bank of NSW* (1992) 174 CLR 219 at 229 (the Court).

21 See, eg, *ICM* (2009) 240 CLR 140 at [133] (Hayne, Kiefel and Bell JJ), and the cases cited there.

22 See, eg, *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 270-271 (Dixon J); *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 249-250 (Dawson J); *John Cooke & Co Pty Ltd v Commonwealth* (1924) 34 CLR 269 at 282 (Privy Council).

23 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1 (***Kruger***) at 40 (Brennan CJ), 86 (Toohey J), 160 (Gummow J, with Dawson J agreeing on this point at 60-61); cf 132 (Gaudron J, dissenting).

24 *DOGS Case* (1981) 146 CLR 559 at 593 (Gibbs J), 618 (Mason J).

which are each subject to conditions. Relevantly, s 9 provides a statutory formula for a grant of general financial assistance to the States for local government purposes.[25] That entitlement is subject to satisfaction of the matters in s 11 and the conditions in s 15 (SC [40], SCB 125). As such, the State has no right to receive a grant under s 9, and a local government (including the Plaintiff) has no right to receive payment of its allocated amount, unless the State satisfies the conditions in s 15. The Plaintiff's apparent invitation to sever the conditions from the grant, by referring to it being "otherwise entitled" to receive particular payments (eg PS [38(c)], [68]), ignores the legal foundation of the alleged "entitlement".

10 22. The reference to the "State" in s 9 means the executive government of the State, as distinct from local government bodies (noting it is the State Minister who is responsible for actually making payments to local governments: s 11(2)(e)[26]).

23. ***Conditions of grant (s 15(a), (aa) and (c)):*** The conditions of a s 9 grant are contained in s 15. Under s 15, as amended by the *Local Government (Financial Assistance) Amendment Act 2000* (Cth) (the **Amending Act**),[27] those conditions include:

(a) By s 15(a), a condition that, subject to s 15(aa), the State will, without undue delay, make unconditional payments to local governing bodies in accordance with the determined allocations.[28]

(b) By s 15(aa), a condition that, if the payment of the grant to States is one "from
20 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 that amount (ie from the amount allocated to local government) and pay it to the Commonwealth. "The payment" referred to is the payment to the local governing body the State would otherwise make in accordance with s 15(a). Section 15(aa)

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25 Under s 4 of the Local Government Financial Assistance Act, 'State' is defined to include the Australian Capital Territory and the Northern Territory. However, ss 11 and 15 of the Local Government Financial Assistance Act have no application to the Australian Capital Territory: see ss 11(1) and 15.

26 See also *Local Government Act 1993* (NSW) ss 619, 620.

27 The Amending Act inserted s 15(aa), and the references to s 15(aa) in ss 15(a) and (c): see Amending Act Sch 1 items 16, 17 and 18.

28 Grants are allocated by States to local governing bodies in accordance with the national principles made under s 6 (SC [43], SCB 126). The allocation process in New South Wales is described at SC [47]-[48], SCB 127.

implements the Commonwealth's undertaking in cl 18 of the 1999 Agreement.[29]

(c) By s 15(c), a condition that, if the Commonwealth tells the State it is satisfied that the State has breached any of the conditions in s 15, the State will repay the amount determined by the Commonwealth. The purpose of the amendment to s 15(c) was to "include [s] 15(aa) as one of the matters to be considered by the Minister when determining if, under [s] 15(c), he [or she] requires the States to repay to the Commonwealth any amounts they have received".[30]

24. ***Amounts withheld disregarded (ss 6(8), 11(3), 14(3)):*** The Amending Act also inserted ss 6(8), 11(3) and 14(3) into the Local Government Financial Assistance Act.[31] The purpose of those provisions is to ensure that an amount withheld under s 15(aa) cannot be taken into account by the State when determining and making allocations to local government.[32]

B.3 NSW Implementation Act

25. Consistently with cl 17 of the 1999 Agreement, New South Wales enacted legislation which provides for the payment of notional GST to the Commissioner of Taxation.[33]

26. Specifically, s 5 of the NSW Implementation Act provides that a "State entity" may pay the Commissioner of Taxation amounts representing amounts that would have been payable for GST, if the imposition were not prevented by s 114 of the Constitution and s 5 of the GST Imposition Acts had not been enacted. A State entity may also do things of a kind that it would be necessary or expedient to do if the entity were liable for that GST.

27. Section 5 is an empowering provision. It reflects the fact that a State entity requires authority under State law to make payments of notional GST, given there is no obligation to make those payments.[34] However, as s 5 confers a power to make payments without

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29 See House of Representatives Debates, 11 May 2000, 16253 (Peter McGauran) (SCB 180); Explanatory Memorandum, Local Government (Financial Assistance) Amendment Bill 2000 (**2000 Amendments EM**) 3 (SCB 183). There was no need for the 2009 Agreement to contain any equivalent to cl 18, as s 15(aa) had already been enacted.

30 2000 Amendments EM at 6 (SCB 186).

31 See items 2, 14 and 15 in Sch 1 to the Amending Act.

32 2000 Amendments EM at 4 and 6 (SCB 184 and 186).

33 See NSW Implementation Act s 4 which expresses the "intention of the State to comply with" the 1999 Agreement and the long title which describes the Act as an Act "to give effect to" the 1999 Agreement.

34 Without s 5 of the NSW Implementation Act, there might be a question whether a payment of notional GST was contrary to the principle in *Auckland Harbour Board v The King* [1924] AC 318 at 326-327.

imposing a duty to do so, it does not change the voluntary nature of notional GST: see further [55] below.

B.4 GST revenue and the Financial Relations Act

28. Independently of and unrelated to the legislative provisions summarised above, the States and Territories receive all of the revenue raised by the GST (minus administration costs) (SC [36], SCB 125). For the States, that occurs by way of s 96 grants, which are made pursuant to s 5 of the Financial Relations Act.

29. Each States' entitlement to a GST revenue grant is calculated by reference to the meaning of "GST revenue" in s 6. In line with cll 17 and 18 of the 1999 Agreement, both notional GST that is paid by States[35] and amounts equivalent to notional GST not paid by local governments[36] are included in the calculation of the amount of GST revenue: s 6(3)(a)(ii) and 6(3)(c). That is, the non-payment of notional GST by a local government body does not affect the calculation of GST revenue and GST revenue grants: see [54] below.

B.5 GST Act

30. As already noted, s 5 of the GST Imposition Acts expressly provides that GST is not imposed on any property of the State within s 114 of the Constitution. Indeed, the very concept of "notional GST" is defined by reference to the circumstances in which GST is not payable by reason of those provisions. Nevertheless, two parts of the GST Act are contextually relevant in assessing the Plaintiff's argument: (i) the general provisions which enable the calculation of GST on taxable supplies; and (ii) the specific provisions which contemplate the participation of the States (and the Commonwealth) in the GST system.

31. ***GST is payable on a taxable supply:*** As to the general provisions, the basic rule of liability is that GST is payable on a "taxable supply".[37] Although the liability to pay GST

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35 That is, "the payments made to the Commissioner of Taxation representing amounts of GST that would have been payable if the Constitution did not prevent tax from being imposed on property of any kind belonging to a State and section 5 of the GST Imposition Acts had not been enacted": Financial Relations Act s 6(3)(a)(ii).

36 That is, "the amount, determined in a manner agreed by the Commonwealth and all of the States, that represents amounts of voluntary GST payments that should have, but have not, been paid by local government bodies": Financial Relations Act s 6(3)(c).

37 GST Act ss 7-1(1), 9-40. See also ss 9-5 (defining "taxable supply"), 9-10 (defining "supply"), 9-15 (defining "consideration").

falls on the supplier, it is the consumer who ultimately bears the burden of the GST.[38] That is because if an entity who acquires a supply is also registered for GST[39] and makes the acquisition in carrying on an enterprise, the entity is entitled to claim an input tax credit (equal to the GST payable on the supply).[40]

32. ***Reporting and assessment provisions:*** The general provisions of the GST Act also provide for the mechanics of reporting GST. Upon an entity lodging a GST return for a particular tax period,[41] the Commissioner is treated as having made an assessment of the "net amount" (being GST offset against input tax credits).[42] That assessment is taken to be conclusive evidence of the taxpayer's liability or entitlement.[43] If the assessment results in a liability, that is a "tax-related liability" enforceable as a debt due to the Commonwealth, payable to the Commissioner,[44] unless and until it is successfully challenged. If dissatisfied with the assessment, the entity may seek review in the Tribunal or may "appeal" to the Federal Court under Part IVC of the Taxation Administration Act.

33. ***Application to "notional GST":*** The general provisions of the GST Act operate in the same way if a State voluntarily reports notional GST as "GST". There is no field in which to report notional GST in the GST return (SC [33], SCB 124), and no obligation in the GST Act or the return itself to include notional GST in the field "GST on sales". As such, no Commonwealth law requires a State to report or pay notional GST: contra PS [56(b)]. Instead, the effect of the general provisions is that — although no liability to pay notional GST arises under the GST Act or anywhere else — if an entity voluntarily reports notional

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38 *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at [3] (the Court). See also *Federal Commissioner of Taxation v MBI Properties Pty Ltd* (2014) 254 CLR 376 at [3], [6]-[9] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

39 An entity that carries on an enterprise whose GST turnover meets the registration turnover threshold (see s 23-15(1)) must be registered for GST: s 23-5. An "enterprise" is defined to include an activity or series of activities done by a State: s 9-20(1)(g).

40 Entitlements to input credits arise on "creditable acquisitions": GST Act s 7-1(2). See also GST Act ss 11-5 (defining "creditable acquisition"), 11-15 (defining "creditable purpose"), 11-20 (establishing entitlement to input tax credits for creditable acquisitions) and 11-25 (providing the amount of input tax credits for creditable acquisitions).

41 An entity that is registered or required to be registered must give the Commissioner a GST return for each tax period: GST Act s 31-5(1). An entity is obliged to give a GST return whether or not it is liable for the GST on any taxable supplies for the relevant period: GST Act s 31-5(2)(b).

42 *Taxation Administration Act 1953* (Cth) (**Taxation Administration Act**) Sch 1 s 155-15(1). The net amount is the amount the entity must pay to the Commonwealth, or the Commonwealth must refund to the entity: GST Act ss 7-15, 17-5.

43 Taxation Administration Act Sch 1 s 350-10 item 2. The validity of an assessment is not affected by the fact that an entity has not complied with the provisions of the GST Act (including by reporting as GST amounts that are not in fact GST): Taxation Administration Act Sch 1 s 155-85.

44 Taxation Administration Act Sch 1 s 250-10(2) item 5, s 255-5.

GST as "GST" in its GST return then the Commissioner's assessment gives rise to an enforceable debt unless the assessment is successfully challenged. However, if an entity were to challenge the assessment on the ground that an amount of "GST" was not payable due to s 114 of the Constitution, the payment of notional GST could not be enforced by the Commonwealth.[45] For those reasons, the reporting and assessment provisions summarised above do not alter the character of notional GST. It remains at all times a voluntary payment. The Plaintiff can choose to pay "notional GST" and to include this amount in a GST return, but there is no obligation on them to do so: see further [56] below.

10 34. As to the specific provisions, s 177-3 of the GST Act enables the recipient of supplies made by States to claim input tax credits in respect of amounts of notional GST included in the consideration for the supply. That provision contemplates that States[46] (who are not liable to pay GST on a supply of property) may choose to include an amount of notional GST in the consideration for supply,[47] which will then allow the GST law to apply as if the supply had been a "taxable supply" and the amount of notional GST is the amount of GST payable on the supply (thereby enabling the person who acquired the property to claim an input tax credit, and to be in the same position as the person would have been in had they acquired the same property from someone other than a State).[48]

C. "NOTIONAL GST" IS NOT A TAX

20 35. The central issue in this proceeding is whether "notional GST" is a tax. The features of a "tax" include that it is a compulsory exaction, enforceable by law. As explained below, notional GST has neither of those features. It follows that it is not a tax, and consequently that there can be no breach of either ss 55 or 114 of the Constitution.

C.1 Local Government Financial Assistance Act, ss 15(aa) and (c) do not impose a tax

36. The conditions on the grant of financial assistance contained in ss 15(aa) and (c) of the Local Government Financial Assistance Act do not provide for the legal or practical compulsory exaction of money from the Plaintiff.

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45 *Landcom* (2022) 114 ATR 639 at [131]-[138] (Thawley J).

46 "Australian government agency", referred to in s 177-3(a), includes a State and an authority of a State – see: s 195-1 of the GST Act; s 995-1 of the *Income Tax Assessment Act 1997* (Cth).

47 GST Act s 177-3(b).

48 GST Act s 177-3(c) and (d); see paragraph 19 above.

37. ***No legal compulsion:*** Starting with legal compulsion, ss 15(aa) and (c) do not create any legal obligation on the Plaintiff to pay notional GST, nor do they impose any sanction on the Plaintiff if it does not pay. To the contrary, the premise for the operation of s 15(aa) and (c) is that local governments may decide not to pay notional GST.

38. *Political agreement*: The words "should have, but have not, been paid" in s 15(aa) do not reinforce or implicitly accept that the Plaintiff is required to pay notional GST (cf PS [38(e)], [40]). Rather, those words direct attention to the political "agreement between the Commonwealth and the State" embodied in the 1999 and 2009 Agreements that provide that notional GST "should" be paid by local councils.[49] That "should" does not suggest a legally enforceable obligation to pay notional GST. As Thawley J correctly recognised in *Landcom*, the States' agreement to pay notional GST "does not give rise to any legal liability to pay" and is "not capable of enforcement by the Commonwealth".[50]

39. *The conditions imposed are on the State, not the Plaintiff:* To the extent that the conditions in ss 15(aa) and (c) impose legal obligations, those obligations are directed to the State (ie the executive government which is the recipient of the grant): see [22] above; cf PS [38]. Properly characterised, those conditions oblige the State to return a portion of the grant paid to it by the Commonwealth in certain circumstances (s 15(aa)) and to repay a portion of the grant if the State does not comply with that condition (s 15(c)). Thus, even if s 15(c) is characterised as a sanction (PS [40]), it is at most a sanction on the State for breaching the conditions of the s 96 grant, not a sanction on the Plaintiff for failing to pay notional GST.[51]

40. *There is no exaction of money enforceable by law:* There is no compulsory exaction from the Plaintiff, because there is no legal requirement that the Plaintiff make any payment of notional GST to the Commonwealth. No money is "taken" from (cf PS [45]-[46]) or "lost" by the Plaintiff (cf PS [50(a)]); rather, the Plaintiff never receives a payment of

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49 See generally *South Australia v Commonwealth* (1962) 108 CLR 130 at 140-141 (Dixon CJ, Kitto J agreeing), 148-149 (McTiernan J), 153-154 (Windeyer J), 157 (Owen J); *Bob Brown Foundation Inc v Commonwealth* (2021) 283 FCR 225 at [48]-[49].

50 *Landcom* (2022) 114 ATR 639 at [42], see also [36]. So much is clear from the opening words ("the parties intend"), which condition the intention subsequently expressed in the imperative ("will… make voluntary or notional payments").

51 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at [560] (Heydon J, referring to *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237): a sanction meant "a condition breach of which would attract legal sanctions".

funds from an external source (the State), being funds that it had no legal right to receive in the absence of compliance with the conditions in s 15.

41. Nor is there any exaction from the State. Any money that is returned or repaid by the State to the Commonwealth as a result of s 15 is, by definition, money that was granted by the Commonwealth to the State under s 96. The State's legal entitlement to that money is, and always was, subject to compliance with the conditions set out in s 15. For two reasons, those conditions cannot properly be characterised as creating a "compulsive demand".[52] *First*, the conditions are only "compulsory" (PS [38(a)], [40]) if the State chooses to accept the s 96 grant (there being no obligation on a State to accept a grant if it is not prepared to accept the accompanying conditions: see [16] above). *Second*, and in any event, the Commonwealth and States agreed to those conditions.[53]

42. Finally, there is no indirect exaction by the Commonwealth from the Plaintiff. Section 15(c) does not make the Plaintiff liable to pay the State, whether expressly or by implication, so cases such as *Mallinson v Scottish Australian Investment Co Ltd*[54] are inapplicable (cf PS [39], [46]). Any action that may be taken by the State to recover any amount from the Plaintiff is a matter for the State. Such action is neither taken under, nor required by, Commonwealth law. As such, it cannot support the existence of a Commonwealth tax.

43. For the foregoing reasons, there is no legal compulsion to pay notional GST. The Plaintiff's description of s 15(aa) as the "collection mechanism and the point of impost" (PS [2]) and the "principal provision that imposes a tax on the plaintiff's property" (PS [39]) both mischaracterises the legal effect of s 15(aa), and fails to reflect the payment for which the Plaintiff seeks restitution.[55]

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

53 Sections 15(aa) and (c) implement the undertaking in cl 18 of the 1999 Agreement: see [12] and [23(b)] above.

54 (1920) 28 CLR 66 at 70, holding that "[w]herever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary". That principle is directed to recovery by the payor from the payee, not recovery by the payee from a third party. In any event, there is no Act of Parliament that creates an obligation to pay notional GST.

55 It is no part of the Plaintiff's case that it has received from the State less than the amount allocated to it under the Local Government Financial Assistance Act, or that the State has returned or repaid to the Commonwealth such an amount.

44. ***No practical compulsion:*** Even if it is assumed that practical compulsion is sufficient to give rise to a tax,[56] no such compulsion exists by reason of ss 15(aa) and (c). These provisions do not give rise to any "practical compulsion" or "forced benevolence" (cf PS [38(b)]-[38(c)], [41]-[46]).

45. To constitute practical compulsion, there must be some detriment that vitiates what otherwise appears to be a choice of alternatives.[57] But here, the conditions in ss 15(aa) and (c) create no "burden or other worse consequence"[58] that the Plaintiff is practically compelled to seek to avoid by paying notional GST. In truth, the choice available to the Plaintiff is as follows:

(a) If the Plaintiff chooses to include an amount of notional GST in the consideration for supply and to pay notional GST to the Commonwealth, it will receive an equivalent amount in a payment from the State under s 9 of the Local Government Financial Assistance Act. That amount in substance provides the Plaintiff with an incentive to operate as if it were subject to the GST legislation, and means that it is no worse of as result of its decision to pay notional GST.

(b) If the Plaintiff chooses to charge the same amount as it would have charged had it included an amount of notional GST in the consideration for supply, but not to pay notional GST to the Commonwealth then, assuming New South Wales complies with the condition in s 15(aa), the Plaintiff will keep the amount equivalent to the notional GST that it "should" have paid to the Commonwealth, but the next grant to the Plaintiff under the Local Government Financial Assistance Act will be reduced by a corresponding amount. The Plaintiff will be no worse off (cf PS [38(c)]). Further, it will be in the same financial position as any other local government that chose to pay notional GST. To deny the Plaintiff a windfall gain is not to "compel" it to make a payment of notional GST.

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[56] See *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 at 561 (Gibbs J, with Barwick CJ, Stephen, Mason, Murphy and Wilson JJ agreeing), who assumed without deciding that practical compulsion would be sufficient to render a charge a tax. Aickin J expressly held that practical compulsion would be sufficient (at 568). See also *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [132] (Gaudron J).

[57] *Homebush Flour Mills* (1937) 56 CLR 390 at 400 (Latham CJ), 405 (Rich J), 408 (Starke J), 413 (Dixon J), 417 (Evatt J), 421 (McTiernan J).

[58] *Homebush Flour Mills* (1937) 56 CLR 390 at 412 (Dixon J).

46. The only way that the Plaintiff could be worse off is if it chooses to reduce the consideration for any supplies by the amount of notional GST that it "should" have paid, and then does not pay notional GST to the Commonwealth. The Plaintiff would then have neither the benefit of retaining the consideration equivalent to the amount of notional GST, nor the full amount of its allocated funding from the State under the Local Government Financial Assistance Act).[59] The Plaintiff does not suggest that it has done this. If it did so, any detriment would be the direct result of its own choices. This hypothetical does, however, illustrate that any inducement created by s 15(aa) is not so much to ensure that the Plaintiff pays notional GST to the Commonwealth (which will end up in the same financial position either way), but rather for the Plaintiff to operate as if it were subject to the GST legislation by including notional GST in the consideration for supply of its property, thereby advancing the purposes of cl 17 of the 1999 Agreement (which, as noted in [11] above, sought to achieve competitive neutrality and promote the coherent operation of input tax credits).

47. *No comparison with* Homebush Flour Mills: The choice identified in the previous paragraph is not "quite illusory" or "quite unreal".[60] Unlike the situation in *Homebush Flour Mills*, where the flour millers were left with the options of purchasing the flour at the higher price or "going out of business", the Plaintiff has a realistic option of not paying notional GST. The Plaintiff's complaint is that its financial position will ultimately be the same even if it makes that choice. That bears no analogy to *Homebush Flour Mills*, where it was the devastating consequences of one of two choices that resulted in compulsion.

48. *No "forced benevolence"*: Nor is there anything that can plausibly be described as a "forced benevolence" (cf PS [41]-[45]). It is simply false for the Plaintiff to assert that, if it "does not pay the notional GST, the amount will be taken from it" (PS [45], emphasis added). The true position is that, if the Plaintiff does not pay notional GST, it will be given less funds from the State (being funds it has no legal right to receive, absent the State's compliance with the conditions in s 15). There is a large difference between taking assets owned by a person (or forcing that person to give up their assets), on the one hand, and not giving a person further assets (being assets they have no legal right to receive). The former may be a "forced benevolence". The latter is not.

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59 Assuming that its lower prices were not offset by any competitive advantage it gained over competing suppliers required to pay GST.

60 *Homebush Flour Mills* (1937) 56 CLR 390 at 399-400 (Latham CJ).

49. *The Plaintiff's factual claims concerning compulsion are not established:* The Plaintiff's submissions assert practical compulsion by reference to other "facts" that are not found in the Special Case. In particular, the Plaintiff's assertions that it would be "forced to function with … less than it needs" and its "ability to fund capital and operating projects … would be compromised" derive no support from the Special Case (cf PS [38(c)]). Nor does the Plaintiff's assertion that the State would engage in "further review or adverse action" if it does not pay notional GST (PS [38(d)]). Those claims should be disregarded.

C.2 The legislative scheme as a whole does not impose a tax

50. Nor can it be said that the legislative scheme as a whole imposes a tax, let alone a Commonwealth tax. The submission that the legislative scheme is a "circuitous device" (PS [48]-[55]) does not take the position any further.

51. ***"Circuitous device":*** The concept of a "circuitous device" is properly understood as meaning no more than that one must examine the practical operation of a particular Commonwealth law.[61] That examination is directed to determining whether the Commonwealth seeks "to do indirectly what is prohibited directly".[62] Section 114 relevantly prohibits the Commonwealth imposing a tax on the property of a State.[63] Accordingly, it is only if notional GST is a Commonwealth tax imposed on the property of the State that any question of a "circuitous device" might arise.[64]

52. While the Plaintiff lists a large number of provisions that are said to have the "combined operation" of impermissibly circumventing s 114 (PS [48]), the Plaintiff's submissions make no real attempt to explain how those provisions have that effect. The provisions on which the Plaintiff relies (PS [50]; cf PS [48]) do not impose a tax on the Plaintiff's property, whether alone or in combination.

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61 *ICM* (2009) 240 CLR 140 at [44] (French CJ, Gummow and Crennan JJ); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 595, 613, 633-634 (Gummow J); *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ).

62 *Re Pacific Coal; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at [29] (Gleeson CJ). See also *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522-523 (Mason CJ, Gaudron and McHugh JJ). PS [51] is to similar effect.

63 The fact that s 114 does not prevent the Commonwealth from imposing income tax on the States demonstrates that mere economic equivalence does not lead to invalidity: see *South Australia v Commonwealth* (1992) 174 CLR 235 at 248 (Mason CJ, Deane, Toohey and Gaudron JJ), discussing the implications of the broad or strict views of s 114.

64 See, in relation to s 51(xxxi), *ICM* (2009) 240 CLR 140 at [139] (Hayne, Kiefel and Bell JJ); see also at [45] (French CJ, Gummow and Crennan JJ), [191]-[192] (Heydon J).

53. In so far as the argument relies on the conditions in ss 15(aa) and (c) (PS [2], [50(a)]), for the reasons already addressed they do not impose a tax.

54. As to the Financial Relations Act, ss 6(3)(a)(ii) and 6(3)(c) impose no obligation on the Plaintiff to make payments of notional GST (and indeed in their terms contemplate that the Plaintiff may not make such payments). The Plaintiff's submission that the effect of the scheme is "to add to the GST revenue… that has been promised to the States" (PS [49]) is plainly incorrect, for s 6(3)(c) actually operates in such a way that the Plaintiff's decision whether or not to pay notional GST has no effect on the amount of GST revenue that is distributed to the States. Thus, far from supporting the Plaintiff's contention, ss 6(3)(a)(ii) and 6(3)(c) suggest that payment of notional GST lacks the revenue-raising feature so often characteristic of a tax.[65]

55. As to the NSW Implementation Act, s 5 of that Act permits the Plaintiff to operate as if it were subject to the GST legislation, and to make payments of notional GST, but it creates no legal obligation to make such payments and attaches no consequences to non-payment. To the extent that s 4 of the NSW Implementation Act incorporates the 1999 Agreement, it has effect according to its tenor.[66] The statements of intention in the 1999 Agreement are political (in the sense that they are not legally enforceable), and s 4 does not convert those terms into legally enforceable obligations.[67] In any event, even if the NSW Implementation Act did impose an obligation on the Plaintiff to pay notional GST (which is denied), that obligation would be imposed by the State, not the Commonwealth. As such, it could not result in a Commonwealth tax that could be contrary to s 114.

56. The Plaintiff does not challenge the provisions of the GST Act and Taxation Administration Act as part of the scheme. In any event, those Acts impose no obligation on the Plaintiff to pay notional GST, or to report notional GST. The Plaintiff only becomes subject to the obligations and potential tax-related liabilities under those Acts (PS [50(c)], [56(b)]) if the Plaintiff voluntarily chooses to charge notional GST, to report it in a GST return, and then not to challenge the assessment of notional GST as GST: see [33] above.[68] Such a voluntary choice is inconsistent with notional GST being a tax.

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65 See *Luton v Lessels* (2002) 210 CLR 333 at [13] (Gleeson CJ), [120]-[121] (Kirby J), [177] (Callinan J).

66 *Interpretation Act 1987* (NSW) s 64A.

67 *Landcom* (2022) 114 ATR 639 at [36] (Thawley J); see footnote 50 above.

68 By analogy, a voluntary election to participate in a superannuation complaints scheme, or to submit to arbitration, means that the decision of the tribunal or arbitrator is not coercive: see, respectively, *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 (***Breckler***) at [38], [44] (Gleeson CJ, Gaudron, McHugh,

D. RELIEF

57. If, contrary to the above, all or part of the legislative scheme imposes a tax on property of the Plaintiff, then a question arises as to what relief should issue.

58. ***No need for constitutional cause of action:*** The Plaintiff asserts that there is a constitutional right to recovery, citing *Kingstreet Investments v New Brunswick*:[69] PS [60]-[62]. This argument is inconsistent with established authority that a breach of the Constitution does not create a private law action against a government, but merely deprives government action of lawful authority.[70] For the following reasons, there is no necessity for the Court to develop a novel constitutional cause of action:[71] the right to recover invalid imposts arises pursuant to the general law.[72]

59. ***No need for separate category of unjust enrichment:*** For similar reasons, there is no need to adopt the reasoning in *Woolwich Equitable Building Society v Inland Revenue Commissioners*[73]: PS [63]-[67]. This Court has not previously recognised a *prima facie* right to recovery in respect of invalid taxes, absent a recognised unjust factor. However, there is *dicta* to the effect that any right of recovery for invalid taxes may properly be based in existing categories of unjust enrichment (such as duress[74] or mistake[75]). Further, such a right of recovery may be consistent with the principle that the executive cannot retain money without entitlement,[76] although Australian restitution law is yet to recognise any distinct "policy motivated" unjust factors.

Gummow, Hayne and Callinan JJ); *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at [31] (the Court). As *Breckler* demonstrates, that is so even if the legislative scheme creates an overwhelming financial incentive to consent.

69 [2007] 1 SCR 3.

70 *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 (***Antill Ranger***) at 99 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ); *Kruger* (1997) 190 CLR 1 at 46-47 (Brennan CJ), 93 (Toohey J), 125-126 (Gaudron J), 146-148 (Gummow J); *James v Commonwealth* (1939) 62 CLR 339 at 362 (Dixon J). There may be narrow qualifications to this position, such as ss 48, 84, 89(iii) and 93(ii) of the Constitution: see *Commonwealth v Mewett* (1997) 191 CLR 471 at 547 (Gummow and Kirby JJ); *Flint v Commonwealth* (1932) 47 CLR 274 at 278 (Dixon J).

71 See *Sims v Commonwealth* [2022] NSWCA 194 (***Sims***) at [96] (Bell CJ, White JA agreeing).

72 *British American Tobacco Ltd v Western Australia* (2003) 217 CLR 30 (***BAT***) at [39]-[41] (McHugh, Gummow and Hayne JJ).

73 [1993] AC 70.

74 See *Mason v New South Wales* (1959) 102 CLR 108 (***Mason***) at 126-127 (Kitto J); *Sargood Brothers v Commonwealth* (1910) 11 CLR 258 at 276 (O'Connor J).

75 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). Attaching a protest to a payment might provide evidence that the payment was not voluntary: *Mason* (1959) 102 CLR 108 at 143 (Windeyer J).

76 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 69 (Mason CJ); *BAT* (2003) 217 CLR 30 at [41] (McHugh, Gummow and Hayne JJ).

60. ***General law***: The usual result of a contravention of a constitutional limitation is that the Court would declare the relevant taxing provision(s) invalid. Subject to valid statutory limitation periods, and valid statutory procedures for recovery, once such a declaration was made there would be nothing to prevent the Plaintiff bringing a general law action for recovery (as in *BAT*).

61. As to limitation periods, there is no constitutional difficulty in subjecting a right to recover invalid taxes to a reasonable limitation period (cf PS [67]).[77] Consistently with that conclusion, it has recently been recognised that the right of governments to recover amounts unlawfully spent under the *Auckland Harbour Board* principle is subject to limitation periods.[78] The same analysis would apply to the right to recover invalid imposts, given the underlying principle is the same: that the executive can act only in accordance with authority conferred by Parliament.

62. As to statutory procedures for recovery, Part IVC of the Taxation Administration Act provides a specific statutory procedure for the Plaintiff to challenge assessments and recover any amounts of notional GST. Even if notional GST were to be held to constitute an invalid tax that would not, by itself, invalidate the Commissioner's past assessments.[79] A finding of invalidity would, however, provide a basis to challenge past assessments under Part IVC on the ground that they were excessive.[80]

63. ***Interest:*** As to interest in a general law cause of action, the *prima facie* entitlement under s 77MA(1) of the Judiciary Act arises only from the date the cause of action arose (s 77MA(1)(a)),[81] and is subject to "good cause to the contrary". Here, good cause exists: the Commonwealth has not had the benefit of the moneys over the period for which interest is claimed because those amounts are paid as GST revenue to the States; and the

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77 Reasonable limits may be placed on recovery, even in constitutional cases: *Antill Ranger* (1955) 93 CLR 83 at 99-100 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ); *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633 at 650 (Webb J), 659-660 (Fullagar J); *BAT* (2003) 217 CLR 30 at [19] (Gleeson CJ). Such a matter would be in federal jurisdiction, and therefore the statutory limitations may include State laws picked up and applied by s 79 of the Judiciary Act.

78 See *Sims* [2022] NSWCA 194 at [94]-[97] (Bell CJ), [118] (Meagher JA), [153] (White JA).

79 Section 350-10(1) provides that an assessment is presumed to be properly made "except in proceedings under Pt IVC of [the Taxation Administration Act] on a review or appeal relating to the assessment".

80 *Landcom* (2022) 114 ATR 639 at [131] (Thawley J); *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 at [100] (Sackville J). See also *Commissioner of State Revenue (Vic) v ACN 005 057 349 Pty Ltd* (2017) 261 CLR 509 at [87] (Bell and Gordon JJ, Gageler J agreeing). The plaintiff's entitlement to interest in a Part IVC proceeding is governed by the *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth) Pt III.

81 When there is a valid assessment, no cause of action will arise until the assessment is successfully challenged: see, by analogy, *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at [11] (Brennan CJ), [68]-[69] (McHugh and Gummow JJ); see also [99] (Kirby J).

Plaintiff has not suffered any financial detriment by paying notional GST (see [45] above).

E. ANSWERS TO SPECIAL CASE QUESTIONS

64. Question 1 should be answered "no": for the reasons given in Part C.1 above, none of the amendments made by items 16, 17 or 18 of Sch 1 to the Amending Act (which added s 15(aa) of the Local Government Financial Assistance Act) impose a tax. Nor did those items purport to introduce a law imposing taxation into an Act that deals with matters other than taxation, contrary to s 55 of the Constitution.

65. Question 2 should also be answered "no". For the reasons given in Part C.2 above, the legislative scheme does not impose a tax on property belonging to the Plaintiff.

66. Question 3 should be answered "none".

67. Question 4 should be answered "the Plaintiff".

68. If the Court were to find that notional GST is a tax, the Commonwealth accepts that: (i) if s 15(aa) is invalid, then items 16, 17 and 18 of Sch 1 to the Amending Act would be invalid as contrary to s 55 (Q(1));[82] (ii) if the scheme is invalid, any provisions of Commonwealth laws comprising the scheme would be invalid to the extent that they concern notional GST; (iii) the matter ought be remitted to the Federal Court (PS [72]).

PART VI: ESTIMATED TIME

69. The Commonwealth estimates that 2.5 hours will be required for oral argument.

Dated: 28 November 2022

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[82] See *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 471-472 (the Court); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 507-508 (Mason CJ, Brennan, Deane and Gaudron JJ).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **HORNSBY SHIRE COUNCIL**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

STATE OF NEW SOUTH WALES
Second Defendant

ANNEXURE TO THE SUBMISSIONS OF THE FIRST DEFENDANT

Pursuant to Practice Direction No.1 of 2019, the First Defendant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

10

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Constitution*	Current	ss 48, 51(ii), 51(xxxi), 55, 84, 89, 93, 96, 114, 116, 122
Statutory provisions			
2.	*A New Tax System (Goods and Services Tax) Act 1999* (Cth)	23 January 2022 to 21 June 2022. Compilation No. 88 [C2022C00064]	ss 3-1, 3-5, 7-1, 7-15, 9-5, 9-10, 9-15, 9-20, 9-40, 11-5, 11-15, 11-20, 11-25, 17-5, 23-5, 23-15, 31-5, 177-3, 195-1

No.	Description	Version	Provisions
3.	*A New Tax System (Goods and Services Tax Imposition—General) Act 1999* (Cth)	1 July 2005 to date. [C2005C00391]	s 5
4.	*A New Tax System (Goods and Services Tax Imposition—Customs) Act 1999* (Cth)	1 July 2005 to date. [C2005C00389]	s 5
5.	*A New Tax System (Goods and Services Tax Imposition—Excise) Act 1999* (Cth)	1 July 2005 to date. [C2005C00390]	s 5
6.	*A New Tax System (Goods and Services Tax Imposition (Recipients)—General) Act 2005* (Cth)	As enacted. [C2005A00003]	s 5
7.	*A New Tax System (Goods and Services Tax Imposition (Recipients)—Customs) Act 2005* (Cth)	As enacted. [C2005A00001]	s 5
8.	*A New Tax System (Goods and Services Tax Imposition (Recipients)—Excise) Act 2005* (Cth)	As enacted. [C2005A00002]	s 5
9.	*Federal Financial Relations Act 2009* (Cth)	1 October 2020 to date. Compilation No. 11 [C2020C00327]	ss 3, 5, 6

No.	Description	Version	Provisions
10.	*Income Tax Assessment Act 1997* (Cth)	2 April 2022 to 21 June 2022. Compilation No. 232 [C2022C00166]	s 995-1
11.	*Intergovernmental Agreement Implementation (GST) Act 2000* (NSW)	6 July 2004 to date.	ss 4, 5
12.	*Interpretation Act 1987* (NSW)	13 April 2022 to date.	s 64A
13.	*Judiciary Act 1903* (Cth)	18 February 2022 to date. Compilation No. 49 [C2022C00081]	ss 77MA, 79
14.	*Local Government Act 1993* (NSW)	1 January 2022 to 15 June 2022.	ss 619, 620
15.	*Local Government (Financial Assistance) Act 1995* (Cth)	10 March 2016 to date. Compilation No. 8 [C2016C00566]	ss 3, 6, 9, 11, 14, 15
16.	*Local Government (Financial Assistance) Amendment Act 2000* (Cth)	As enacted. [C2004A00665]	Sch 1 items 2, 14, 15, 16, 17, 18
17.	*Taxation Administration Act 1953* (Cth)	2 April 2022 to 21 June 2022. Compilation No. 191 [C2022C00159]	Pt IVC, sch 1 ss 155-15, 155-85, 155-90, 250-10, 255-5, 350-10

No.	Description	Version	Provisions
18.	*Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth)	30 August 2019 to date. Compilation No. 56 [C2019C00266]	Pt III