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

No. S202/2021

BETWEEN:

Hornsby Shire Council
Plaintiff

and

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Commonwealth of Australia
First Defendant

and

The State of New South Wales
Second Defendant

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SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

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

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PART II: Basis of intervention

2. The Attorney-General for Queensland (**Queensland**) intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the defendants.

PART IV: Submissions

SUMMARY OF ARGUMENT

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4. Queensland makes two points.

5. *First*, s 96 of the Constitution is not subject to s 114 of the Constitution because those sections are concerned with mutually exclusive things: voluntarily accepted grants compared to compulsory exactions.

6. *Second*, even if the plaintiff were correct that either or both of the *Local Government (Financial Assistance) Act 1995* (Cth) and the *Federal Financial Relations Act 2009*

(Cth) were invalid, the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) (**NSW Act**) would not be inoperative. The NSW Act is not conditioned upon the agreement with the Commonwealth being valid and therefore cannot be rendered inoperative (let alone invalid) on that basis.

STATEMENT OF ARGUMENT

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Section 96 is not subject to s 114

7. Two factors taken together show that s 96 is not subject to s 114: those provisions concern the movement of money in opposite directions and are characterised by the opposing qualities of voluntariness and coercion.

8. Section 96 authorises the Commonwealth to grant financial assistance to a State on the terms and conditions it thinks fit. Section 96 is concerned with 'grants' from the Commonwealth to a State which are 'voluntary'.

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9. Section 114 relevantly prevents the Commonwealth from imposing a tax on property of any kind belonging to a State. Section 114 is concerned with 'exactions' from a State to the Commonwealth which are 'compulsory', given that a tax is a compulsory exaction, enforceable by law.[1]

10. 'Exactions' and 'grants' concern the movement of money in opposite directions, one into the consolidated revenue fund and one out of the consolidated revenue fund. As Latham CJ said in the *First Uniform Tax Case*, it is difficult to see how an Act 'making grants to States' could be an Act 'with respect to taxation'.[2] As 'exactions' and 'grants' are mutually exclusive, ss 96 and 114 are mutually exclusive.

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11. Further, 'voluntary' and 'compulsory' are opposing qualities. A grant authorised by s 96 must be 'voluntary' in nature,[3] whereas a tax under s 114 must be 'compulsory' in nature. Whilst it is conceivable that a purported grant of financial assistance could be coercive[4] (and for that reason fall outside the scope of s 96, notwithstanding that

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1 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 276 (Latham CJ).
2 *South Australia v Commonwealth* (1942) 65 CLR 373, 428 (Latham CJ) ('*First Uniform Tax Case*') (emphasis removed).
3 '[I]n s 96 there is nothing coercive': *Victoria v Commonwealth* (1957) 99 CLR 575, 605 (Dixon CJ) ('*Second Uniform Tax Case*').
4 For example, in *National Federation of Independent Business v Sebelius*, 567 US 519 (2012), the plurality of the US Supreme Court found that federal grants to the States for expanded Medicaid coverage were

section's 'very extended meaning'[5]), here there is no basis to conclude that New South Wales has been coerced.

12. In light of that analysis, the plaintiff's attempt to draw analogies with s 116 and s 51(xxxi) fails.[6] Because s 96 and s 114 concern mutually exclusive things, a law granting financial assistance to a State (under s 96) can never be a law imposing taxation on any property of the State (for s 114). By contrast, s 96 and s 116 do not concern mutually exclusive things. It is possible for a law both to grant financial assistance to a State and to be characterised as a law 'for establishing any religion, or for imposing religious observance, or for prohibiting the free exercise of any religion', contrary to s 116.[7] Likewise, it is possible for a law both to grant financial assistance and to be characterised as a law for the acquisition of property (and thus engage s 51(xxxi)).[8]

New South Wales Act is not inoperative

13. A State law cannot be invalid under the final clause of s 114, because that clause only applies to the Commonwealth. Section 114 says nothing about the exaction of money by a State from itself (or from an entity which is indistinct from the State), not least because such an exaction is not a tax.[9]

14. The plaintiff submits, however, that ss 4 and 5 of the NSW Act should be found to be 'inoperable' because they form part of a 'circuitous device' to defeat s 114. Presumably, the plaintiff seeks to draw an analogy to *PJ Magennis Pty Ltd v Commonwealth* ('*Magennis*'), in which a State law was found to be inoperative because it was conditioned on an agreement with the Commonwealth found invalid for

impermissibly coercive. The conditions had the effect that if a State failed to comply with the new coverage requirements, it could lose not only the federal funding for those requirements, but all its federal Medicaid funds. As Roberts CJ recognised, there is a point at which inducement gives way to coercion, which was reached in that case: see 575-88 (2012, Roberts CJ, joined by Breyer and Kagan JJ on this point). Ginsburg and Sotomayor JJ disagreed on this point, but nonetheless agreed that the penalty of losing existing federal Medicaid funding could be severed from the scheme: at 645-6.

5 *Second Uniform Tax Case* (1957) 99 CLR 575, 611 (Dixon CJ).

6 PS [31].

7 *Attorney-General (Vic) ex rel Black* (1981) 146 CLR 559, 576 (Barwick CJ), 593 (Gibbs J), 618 (Mason J), 635 (Aickin J), 650-1 (Wilson J). That is, it is conceivable that a law granting financial assistance to a State on conditions might have 'the purpose of achieving an object which s 116 forbids': *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan J). See also at 86 (Toohey J), 132 (Gaudron J), 160 (Gummow J).

8 *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 403 (Latham CJ), 428-9 (Webb J) ('*Magennis*').

9 *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530, 541-2 [19]-[22] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

breach of s 51(xxxi).[10] For at least three reasons, there is no analogy with *Magennis*.

15. *First*, the State law in *Magennis* carried out the thing that s 51(xxxi) safeguards against; that is, an acquisition of property. In this case, the State law does not carry out anything that s 114 safeguards against; that is, a compulsory exaction. Section 5 of the NSW Act merely permits State entities to pay money to the Commissioner of Taxation. The NSW Act does not contribute any element of a tax which can be assembled with other elements into a breach of s 114.

16. *Second*, even if there is something 'circuitous' in the Commonwealth and a State entering into an agreement by which the State acquires property from an individual,[11] there is nothing circuitous about a State agreeing to impose a levy upon itself or an emanation of itself. Section 51(xxxi) provides a 'constitutional guarantee'[12] designed (relevantly) to protect the rights of the individual.[13] By contrast, the prohibition in s 114 against Commonwealth taxes on State property is designed to protect the States from interference that 'may tend to destroy [their] power or impair their efficiency'.[14] Here, as the State is a party to the agreement, the rationale of s 114 is not undermined; nothing has been 'got around'.

17. *Third*, unlike the State law found to be inoperative in *Magennis*, in this case, the NSW Act is not conditioned on the validity of any Commonwealth law or agreement. As *Pye v Renshaw* makes clear, s 51(xxxi) provides 'no possible ground of attack' on the validity or operation of such legislation.[15]

18. Here, while s 4 of the NSW Act signposts to the agreement set out in the schedule, it does not purport to give the agreement independent operation.[16] Nor does s 4 suggest

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[10] (1949) 80 CLR 382. Although the plaintiff's submissions and proposed orders suggest reliance on *Magennis*, the plaintiff does not actually refer to that case: see PS [51]-[54], [71](2).

[11] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 169-70 [44] (French CJ, Gummow and Crennan JJ). Cf at 198 [136] (Hayne, Kiefel and Bell JJ).

[12] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J).

[13] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 613 (Gummow J).

[14] *Wisconsin Central Railroad Co v Price County*, 133 US 496, 504 (1890, Field J), quoted with approval in *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 233 (Barton J).

[15] (1951) 84 CLR 58, 79-80 (Dixon, Williams, Webb, Fullagar and Kitto JJ).

[16] Just as appending a treaty to an Act in a schedule does not give the treaty independent operation: *Minogue v Williams* (2000) 60 ALD 366, 372-3 [21]-[25] (Ryan, Merkel and Goldberg JJ); *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J), 359-60 (Toohey J).

that the remainder of the Act is conditioned on the validity of the agreement.[17] The operative provision of the NSW Act is s 5. It operates on the premise of a counterfactual that 'section 5 of each of the GST Imposition Acts had not been enacted'. That is, the permission given in s 5 does not expressly or implicitly hinge upon the validity of any Commonwealth law or agreement; it hinges upon the counterfactual of the *non-existence* of Commonwealth laws.

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19. This Court has never doubted the conclusion in *Pye v Renshaw*. That conclusion reflects the text of s 51(xxxi) and the settled understanding of how it operates, namely, by abstracting the power to acquire property from other heads of Commonwealth legislative power.[18] The question left open in *ICM Agriculture Pty Ltd v Commonwealth* and *Spencer v Commonwealth* concerned the extent of the legislative power of the Commonwealth, not of the States.[19] Insofar as the Full Court of the Federal Court may have suggested that s 51(xxxi) can invalidate a State law where 'the State is required under an intergovernmental agreement with the Commonwealth to acquire the property on other than just terms,'[20] those views are inconsistent with authority in this Court and should not be followed. The validity and operation of a State law does not turn on the terms of an intergovernmental agreement; it turns on the terms of the State legislation.

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20. For these reasons, regardless of the validity of the impugned Commonwealth laws, there is no basis for finding that ss 4 and 5 of the NSW Act are inoperative (and certainly not invalid). Question 2 of the Special Case should be answered accordingly.

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PART V: Time estimate

21. It is estimated that Queensland will require 10 minutes for oral argument.

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[17] Cf *Tunnock v Victoria* (1951) 84 CLR 42, 48 (Dixon J), 50-1 (McTiernan J), 56-7 (Williams and Webb JJ), 57 (Kitto J).

[18] *Theophanous v Commonwealth* (2006) 225 CLR 101, 124 [55] (Gummow, Kirby, Hayne, Heydon and Crennan JJ), citing *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270, 283 (Deane and Gaudron JJ).

[19] *Spencer v Commonwealth* (2010) 241 CLR 118, 134 [32] (French CJ and Gummow J), 142 [61] (Heydon J); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 168 [37]-[38] (French CJ, Gummow and Crennan JJ).

[20] *Spencer v Commonwealth* (2018) 262 FCR 344, 381-2 [172], 390 [210] (Griffiths and Rangiah JJ), 424 [354] (Perry J). Cf PS [54].

Dated: 12 December 2022

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Annexure 1

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S202/2021

BETWEEN:

Hornsby Shire Council
Plaintiff

and

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Commonwealth of Australia
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SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

Statutes and Statutory Instruments referred to in the submissions

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

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No.	Description	Version	Provisions
Constitutional provisions			
1.	Commonwealth Constitution	Current	ss 51(xxxi), 96, 114, 116
Statutes			
2.	*Federal Financial Relations Act 2009* (Cth)	1 October 2020 to date. Compilation No. 11 [C2020C00327]	
3.	*Intergovernmental Agreement Implementation (GST) Act 2000* (NSW)	6 July 2004 to date	ss 4, 5, schedule 1
4.	*Judiciary Act 1903* (Cth)	18 February 2022 to date. Compilation No. 49 [C2022C00081]	s 78A
5.	*Local Government (Financial Assistance) Act 1995* (Cth)	10 March 2016 to date. Compilation No. 8 [C2016C00566]	