HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S202 of 2021

BETWEEN:

HORNSBY SHIRE COUNCIL
Plaintiff

and

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COMMONWEALTH OF AUSTRALIA
First Defendant

STATE OF NEW SOUTH WALES
Second Defendant

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

PARTS I, II AND III: CERTIFICATION AND INTERVENTION

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

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

PART IV: ARGUMENT

A. INTRODUCTION

3. The central issue raised by the Special Case is whether certain Commonwealth and New South Wales provisions relating to "notional GST" (**SCB 121 [17]**), either individually or cumulatively, operate so that the Commonwealth is imposing a tax on property belonging to the plaintiff. In summary, Victoria submits as follows:

(1) Section 15(aa) and (c) of the *Local Government (Financial Assistance) Act 1995*
30 (Cth) (the **Local Government Financial Assistance Act**) do not impose a tax. They do not compulsorily exact payments of notional GST from either the plaintiff or the second defendant.

(2) Those provisions and the other Commonwealth and New South Wales provisions identified in Question 2 of the Special Case (together, **the impugned provisions**) are otherwise valid. None of them imposes a tax, and the plaintiff does not contend

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that they otherwise adopt means that are constitutionally prohibited. That the impugned provisions are apt to produce a similar *practical result* to a hypothetical law which would contravene s 114 of the Constitution is not a criterion of invalidity.

4. Accordingly, the plaintiff is not entitled to any relief and the plaintiff's contentions in relation to Question 3 do not arise (**PS [59]-[70]**). If those contentions are reached, Victoria submits that there is no constitutional right to restitution of moneys paid pursuant to invalid tax legislation. Common law actions giving rise to relief by way of restitution may be available where an exaction is held to be invalid, but subject to any applicable legislative limitations on such relief.

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B. OVERVIEW OF THE NOTIONAL GST SCHEME

The intergovernmental agreements

5. The impugned provisions give effect to the joint intentions of the Commonwealth and State and Territory governments recorded in the 1999 Agreement[1] and corresponding provisions of the 2009 Agreement.[2] The relevant features of those agreements are as follows:

   (1) Clause 7 of the 1999 Agreement (and cl 25 of the 2009 Agreement) stated that the Commonwealth would make grants to the States and Territories of amounts equivalent to the revenue from the GST (**SCB 157, 238**).

   (2) Clause 17 of the 1999 Agreement (and cl A28 in Sch A to the 2009 Agreement) stated that 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*" (emphasis added) (**SCB 158, 248**). That intention would be realised through, among other things, the making of "voluntary or notional payments where necessary". Such payments are defined in the Special Case as "notional GST" (**SCB 121 [17]**). Any payments of notional GST were to be included in GST revenue.

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   (3) Clause 18 of the 1999 Agreement stated that the Commonwealth would legislate to require the States and the Northern Territory to withhold from any local government

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[1] Intergovernmental Agreement on the Reform of Commonwealth–State Financial Relations (1999) (**SCB 155-178**).

[2] Intergovernmental Agreement on Federal Financial Relations (2009) (**SCB 232-279**).

authority "a sum representing the amount of unpaid voluntary or notional GST payments" (**SCB 158**). Such withheld sums would, as with payments of notional GST, form part of the pool of GST revenue.

6. The 1999 Agreement and the 2009 Agreement each contain "statements of political intent" which are not themselves a source of any enforceable rights or obligations.[3] So much is apparent from the nature of the agreements, the framing of the provisions in terms of the parties' intent as to what "will" occur, and the statement in cl 18 of the 1999 Agreement that the Commonwealth "will legislate" to "require" the withholding of sums from local government authorities. Any relevant rights and obligations are to be
10 discerned from the impugned provisions.

Commonwealth provisions

7. The principal mechanism for implementing the intentions expressed in cll 17 and 18 of the 1999 Agreement is contained in the Local Government Financial Assistance Act. Part 2 provides for payments to each State[4] for local government purposes and sets out the conditions to which such payments are subject.

(1) Section 9 provides that "each State is entitled to the payment" of a "general grant" for local government purposes, calculated in accordance with that provision and subject also to s 11.

(2) Section 11(2) provides that "[a] State is not entitled to payment of an amount under
20 section 9 in respect of a year" unless the criteria in paragraphs (a) to (g) are satisfied. Those paragraphs establish a procedure for the "allocation" of the "amount" in s 9 to local government; in particular, paragraph (g) makes the State's entitlement to payment contingent upon allocating the amount among local governing bodies in the State in accordance with the proposed allocation worked out in accordance with paragraphs (a) to (f).[5]

3 *Landcom v Federal Commissioner of Taxation* (2022) 114 ATR 639 at 647-648 [36] (Thawley J). See generally Cheryl Saunders, "Intergovernmental agreements and the executive power" (2005) 16 *Public Law Review* 294 at 298-299.

4 "State" is defined to include the Australian Capital Territory and the Northern Territory unless the contrary intention appears: Local Government Financial Assistance Act, s 4(2). However, the Australian Capital Territory is expressly excluded from the operation of ss 11, 14 and 15: see ss 11(1), 14(1) and the chapeau to s 15.

5 The implementation of this procedure in relation to New South Wales is described in the Special Case at **SCB 126-127 [43]-[48]**. Sections 12 to 14 of the Local Government Financial Assistance Act adopt

(3) Section 15 then contains conditions to which "[p]ayment of an amount to a State" is "subject". Relevantly:

(a) Section 15(a) provides that, *subject to* the condition in s 15(aa), the State will make unconditional payments to local governing bodies in the State in accordance with the allocation determined under s 11.

(b) Section 15(aa) provides 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
10 withhold the amount and pay it to the Commonwealth. The possibility that an amount may be withheld by the State under s 15(aa) is disregarded when determining the allocation of amounts paid under s 9 among local governing bodies: s 11(3).[6]

(c) Section 15(c) provides that, if the Minister tells the Treasurer of the State that the Minister is satisfied that the State has, with respect to the whole or a part of the amount, failed to fulfil any of the conditions applicable under paragraphs (a), (aa) and (b) to the payment of the amount, the State will repay to the Commonwealth any amount determined by the Minister that is not more than the amount in respect of which the Minister is so satisfied.

20 8. Part 2 of the Local Government Financial Assistance Act thus confers an entitlement on *the State* to the receipt of certain payments by way of financial assistance, and that entitlement is relevantly subject to the State applying the financial assistance in accordance with the conditions in s 15(a) and (aa).

9. The effect of s 6(3)(a)(ii) and (c) of the *Federal Financial Relations Act 2009* (Cth) is that payments of notional GST and amounts of notional GST that should have, but have not, been paid by local government bodies are each included as a component of "GST revenue". "GST revenue", in turn, forms part of the formula used to calculate GST revenue grants to each State: ss 5(1) and 6(2). These grants are separate from the

substantially the same form as ss 9 to 11 for the payment to the State of what are described as "additional" amounts.

6 See also Local Government Financial Assistance Act, ss 6(8) (s 15(aa) is disregarded when formulating national principles for the purpose of allocating amounts among local governing bodies) and 14(3) (s 15(aa) is disregarded when determining the allocation of amounts paid under s 12 among local governing bodies).

grants made to each State for local government purposes under the Local Government Financial Assistance Act.

New South Wales provisions

10. Section 5 of the *Intergovernmental Agreement Implementation (GST) Act 2000* (NSW) (the **NSW Implementation Act**) provides that a "State entity" may pay to the Commissioner of Taxation amounts representing amounts that would have been payable for GST but for the operation of s 114 of the Constitution and s 5 of each of the "GST Imposition Acts".[7]

11. Section 4(2) provides that it is the intention of the State to comply with, and give effect
10 to, the 1999 Agreement, the text of which is included as Schedule 1. The inclusion of the text of the 1999 Agreement did not convert the expressions of political intent contained in that Agreement into enforceable legal obligations.[8]

C. VALIDITY OF THE IMPUGNED PROVISIONS

12. Section 114 prohibits "the Commonwealth [from] impos[ing] any tax on property of any kind belonging to a State". The question for determination is whether, through the Local Government Financial Assistance Act (or that Act in combination with the other impugned provisions), the Commonwealth has imposed such a tax.

13. The resolution of that question is not assisted by abstract propositions about the "relationship" between ss 114 and 96 of the Constitution (**cf PS [14]-[33]**). The question
20 of validity turns on an examination of the terms and operation of the impugned provisions. That examination yields the conclusion that the impugned provisions do not impose a tax. Still less do they impose a Commonwealth tax on property belonging to the plaintiff, being the relevant emanation of the State for the purposes of s 114 of the Constitution. It follows that none of the impugned provisions are invalid.

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7 "GST Imposition Acts" is defined in s 3(1) to mean *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) and *A New Tax System (Goods and Services Tax Imposition—General) Act 1999* (Cth). Section 5 of each Act provides that the Act does not impose a tax on property of any kind belonging to a State.

8 See *South Australia v Commonwealth* (1962) 108 CLR 130 at 139-141 (Dixon CJ, with Kitto J agreeing), 148-149 (McTiernan J), 149 (Taylor J), 153-155 (Windeyer J) (dealing with an intergovernmental agreement included in the schedules to a Commonwealth Act and a State Act).

14. In the balance of these submissions, the phrase "the State" is used to refer specifically to the second defendant.

C.1 Section 15(aa) and (c) of the Local Government Financial Assistance Act do not impose a tax

15. An "acceptable general statement" of the meaning of a "tax" for constitutional purposes is that it comprises a compulsory exaction of money by a public authority for public purposes, enforceable by law, which is not one of various other special types of exaction.[9] Compulsion stands in contrast to notions of consent or voluntariness; it will commonly be illustrated by the imposition of penal consequences designed to secure compliance
10 with an obligation.[10] The "imposition" of a tax, in turn, involves "the creation of a liability" to pay the sum exacted.[11]

16. The plaintiff's principal submission is that s 15(aa) of the Local Government Financial Assistance Act ("supported by" s 15(c)) compulsorily exacts notional GST on the plaintiff's property from either the plaintiff or the State or both (**PS [38]-[39]**). None of the variants of that submission can be accepted.

<u>*No compulsory exaction enforceable by law*</u>

17. **No compulsory exaction of notional GST from the plaintiff.** The contention that s 15(aa) compulsorily exacts notional GST from the plaintiff fails for two principal reasons.

20 18. *First*, the Local Government Financial Assistance Act imposes no obligations — still less, any legally enforceable obligations — on the plaintiff. Each of s 15(a), (aa) and (c) is addressed to the State, and makes the payment of an amount to the State contingent on the State complying with specified conditions. Section 15(aa) contains a condition that the State withhold an amount that represents "voluntary GST payments that should have, but have not, been paid by" local governing bodies such as the plaintiff. The mere reference to payments that "should have … been paid" by a local governing body does not convert the expressions of political intent in the 1999 Agreement and the

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9 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 466-467 (the Court).

10 See *City of Halifax v Nova Scotia Car Works Ltd* [1914] AC 992 at 998 (Lord Sumner, for the Privy Council); *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 at 175 (Lord Thankerton, for the Privy Council).

11 *Re Dymond* (1959) 101 CLR 11 at 19, 21 (Fullagar J, with Dixon CJ, Kitto and Windeyer JJ agreeing).

2009 Agreement into statutory obligations owed by, and enforceable against, the plaintiff [**cf PS [38(e)]**]. Nothing in the Local Government Financial Assistance Act, or any other of the impugned provisions, imposes on the plaintiff an obligation to pay moneys to the Commonwealth.

19. *Second*, s 15(aa) does not operate to "exact" or "take" anything *from the plaintiff*, whether via the State or otherwise. The premise of the plaintiff's contention is that it has a prior entitlement to what it describes as the "full grant" (being the amount determined under the allocation procedure in s 11 without regard to any "reduction": s 11(3)), such that s 15(aa) requires the State to "take" from the plaintiff a part of the amount to which it is
10 "otherwise entitled" (**PS [38(c)], [39], [45]**). The premise is wrong. It inverts the operation of the statutory scheme. Any expectation that the plaintiff has to the payment of moneys by the State under the Local Government Financial Assistance Act arises only as a *consequence* of the conditions in s 15 — including s 15(aa). To reinforce that point, s 15(a) (the condition that the State is to make payments to local governing bodies in accordance with, relevantly, the allocation determined under s 11) is expressed to be "subject to" the condition in s 15(aa). Thus, the true position is that s 15(aa) makes the non-payment of notional GST the final *input* in the statutory formula for calculating what amount a local governing body ought to receive from the State.

20. Separately, the plaintiff contends that it is compelled to pay notional GST by reason of
20 s 15(c), because it "may be liable to repay" the State (**PS [39]**). This, it appears, is intended to mean that the plaintiff has a liability to reimburse the State for any amount determined by the Commonwealth Minister and paid by the State. The contention is misconceived. The principle explained in *Mallinson v Scottish Australian Investment Co Ltd* is that, *where an Act creates an obligation to pay money*, an action will lie for its recovery in the absence of a contrary statutory intention.[12] Contrary to the submission of the plaintiff, the principle is not engaged here: neither s 15(c) nor any other provision imposes any obligation on the plaintiff to "repay" or reimburse the State for the amount determined under s 15(c). Accordingly, the notion of the State having a right of action against the plaintiff arising under s 15(c) does not arise. Again, if the plaintiff does not
30 pay notional GST, the *State* is to withhold an amount that represents the amount of unpaid notional GST and pay it to the Commonwealth (s 15(aa)); and if it does not do so, the

12 (1920) 28 CLR 66 at 70 (Knox CJ, for the Court).

State may be obliged to pay to the Commonwealth an amount determined by the Minister (s 15(c)).

21. **No compulsory exaction of notional GST from the State.** Section 15(aa) also does not compulsorily exact notional GST from the State (**cf PS [38(a)**). Section 15(aa) stipulates how a part of a payment of financial assistance is to be used, in circumstances where a local governing body has not paid an amount of notional GST. In particular, the State is to "withhold" an equivalent amount and pay it back to the Commonwealth. The State's "entitlement" to any amount from the Commonwealth is subject to compliance with the conditions in s 15. Accordingly, the operation of s 15(aa) in directing how moneys received from the Commonwealth are to be used can involve no compulsory exaction from the State. The suggestion that s 15(c) "support[s]" or "ensures compliance" with s 15(aa) takes the matter no further: the provision that is being "supported" does not exact moneys from the State (**cf PS [39]**). Further, and more generally, any obligations that arise under s 15(aa) and (c) arise only as conditions on a grant of financial assistance; and acceptance of a grant with its accompanying conditions is not compelled.[13]

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No "practical" compulsion or "forced benevolence"

22. There is no difference between the plaintiff's contention that it is "practical[ly]" compelled to pay notional GST (**PS [37]**), and the contention that the impugned provisions create a "forced benevolence" in the sense considered in *Attorney-General (NSW) v Homebush Flour Mills Ltd* (***Homebush Flour Mills***) (**PS [41]-[45]**).[14] The substance of both contentions is that, even if there is no legal compulsion giving rise to an enforceable liability to pay notional GST, the payment of notional GST is nonetheless to be characterised as compulsory rather than "voluntary" (**PS [38(b)], [42], [46]**). Assuming that some forms of "practical" compulsion may be relevant for the purposes of determining whether there is a tax,[15] the plaintiff's argument is nonetheless without merit in each of its forms.

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[13] See *Victoria v Commonwealth* (1957) 99 CLR 575 at 605 (Dixon CJ).

[14] (1937) 56 CLR 390 at 400 (Latham CJ).

[15] See *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 (***General Practitioners Society***) at 561 (Gibbs J, with Barwick CJ, Stephen, Mason, Murphy and Wilson JJ agreeing); see also at 565 (Murphy J) and 568 (Aickin J); *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133 (***Airservices***) at 189 [132] (Gaudron J), 232 [289] (McHugh J), 297-298 [493] (Gummow J).

23. *First*, the only direct consequence of a choice by the plaintiff not to pay an amount of notional GST is that, assuming the State complies with the condition in s 15(aa), the State will "withhold" an equivalent amount and pay it to the Commonwealth rather than to the plaintiff. There is no additional detriment to the plaintiff amounting to "a sanction incurred by failure to pay" (**cf PS [44]**).[16] Non-payment of notional GST has no net financial consequence for the plaintiff. Accordingly, the plaintiff's contention that it will be "exposed to detrimental consequences" if it does not pay notional GST is wrong (**PS [38(c)]**). As with the plaintiff's contention with respect to legal compulsion, the contention incorrectly assumes that the plaintiff is "otherwise entitled" to what is
10 described as the "full grant" and that s 15(aa) thus results in an amount being "taken from it" (**cf PS [45]**).

24. *Second*, the only other detriment asserted by the plaintiff is that "non-compliance with laws and regulations and circulars issued by the NSW Government may result in further review or adverse action as to the management of the plaintiff" (**PS [38(d)]**). The sole provision of State law which governs the payment of notional GST is s 5 of the NSW Implementation Act, which permits but does not require the making of payments of notional GST. The plaintiff does not otherwise adequately identify how a choice not to pay notional GST would lead to "further review or adverse action", nor does the Special Case provide an adequate basis for inferring that any such action may take place. In any
20 event, the burden of the plaintiff's challenge is to demonstrate that *the Commonwealth* has effected a compulsory exaction of moneys. The possibility (assuming it to exist) of "further review or adverse action" by the executive government of the State does not, without more, demonstrate any compulsion by the Commonwealth.

25. *Third*, the Local Government Financial Assistance Act bears no resemblance to, and has none of the constitutional vices of, the scheme held to be invalid in *Homebush Flour Mills*. The Commonwealth Act at issue in that case operated to expropriate flour belonging to millers, who were thereupon presented with the "unreal" choice between (1) buying back their stock at the price fixed by the Commonwealth, and (2) suspending their business and being exposed to ruinous consequences.[17] For the reasons already
30 given, no such consequences arise here. Judicial statements dealing with the notion of

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

[17] *Homebush Flour Mills* (1937) 56 CLR 390 at 400 (Latham CJ); see also at 405 (Rich J), 412-413 (Dixon J).

"practical compulsion" have likewise been concerned with circumstances where, in a practical sense, an amount must be paid as the price for carrying on some undertaking at all.[18] Again, that is not this case.

C.2 The impugned provisions are not invalid as a "circuitous device"

26. The plaintiff's alternative submission is that, even if no Commonwealth law imposes a tax on its property, the impugned provisions collectively constitute a "circuitous device" to circumvent s 114 "indirectly" (**PS [48]**). The submission is misconceived. It conflates a proposition that is uncontentious with one that is untenable.

27. The uncontentious proposition is that the practical operation and effect of a law may be relevant to the process of constitutional characterisation.[19] That is the sense in which the notion of a "circuitous device" has been used in the context of s 51(xxxi) of the Constitution: namely, to point out that s 51(xxxi) is engaged not only where a law is concerned with "the taking of title", but also where "the substance" of a proprietary interest is acquired.[20] Thus "the practical effect *of the law in question*" must be considered.[21] These statements do not assist the plaintiff. Recourse to the language of "circuitous device" does not relieve the plaintiff of the need to identify how "the law in question" imposes a tax. For the reasons already given, neither the Local Government Financial Assistance Act nor any other Commonwealth law does so.

28. The untenable proposition is that, if a hypothetical Commonwealth law would infringe s 114 by imposing a tax on property belonging to a State, a law or combination of laws (including State laws) that is intended to produce the same or a similar *practical result* to the hypothetical law likewise contravenes s 114, or perhaps some implied constitutional prohibition against the "circumvention" of that section (**PS [32], [48], [55]**). Adopting and adapting observations made by Dixon J in *Homebush Flour Mills*:[22]

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[18] *General Practitioners Society* (1980) 145 CLR 532 at 561 (Gibbs J); *Airservices* (2000) 202 CLR 133 at 232 [289] (McHugh J).

[19] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 (***ICM Agriculture***) at 198-199 [138] (Hayne, Kiefel and Bell JJ); *Spence v Queensland* (2019) 268 CLR 355 at 404-405 [57] (Kiefel CJ, Bell, Gageler and Keane JJ).

[20] *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349 (Dixon J). See *ICM Agriculture* (2009) 240 CLR 140 at 169-170 [44] (French CJ, Gummow and Crennan JJ), 198 [136] (Hayne, Kiefel and Bell JJ).

[21] *ICM Agriculture* (2009) 240 CLR 140 at 169 [44] (French CJ, Gummow and Crennan JJ) (emphasis added); see also at 198 [138] (Hayne, Kiefel and Bell JJ).

[22] *Homebush Flour Mills* (1937) 56 CLR 390 at 414 (Dixon J); see also at 402 (Latham CJ).

> The fact that [the impugned provisions are] an attempt to secure the same result as would have been obtained by a [tax on property belonging to a State] if such a [tax] fell within the legislative power of the [Commonwealth] Parliament does not necessarily mean that the attempt fails. The same ends may be attainable by different means. Some means may be within power, others may be outside it.

29. There is no question that the impugned provisions are intended to achieve an economic outcome in which the plaintiff operates "as if" it were subject to the GST legislation (**SCB 158, 248**). That is not a criterion of invalidity. The impugned provisions seek to realise the intentions in the 1999 Agreement and 2009 Agreement "by means that are not
10 anywhere forbidden by the Constitution";[23] in particular, by means that involve no imposition of a tax, let alone a Commonwealth tax, on the plaintiff's property. There is thus no contravention of s 114 (or, equally, s 55) of the Constitution. The plaintiff does not contend that the impugned provisions are invalid for any other reason. Accordingly, the plaintiff's challenge fails.

C.3 Conclusion on validity

30. Neither the Local Government Financial Assistance Act, nor any of the other impugned provisions, imposes a tax on property belonging to the plaintiff or the State. Questions 1 and 2 should be answered: "No". Question 3 should be answered: "None".

D. RELIEF

20 31. The negative answers to Questions 1 and 2 make it unnecessary to address the plaintiff's contentions with respect to relief. Victoria makes the following submissions in the event that it becomes necessary to address those contentions.

D.1 No constitutional right to restitution

32. The plaintiff contends that there is a personal right, derived from the Constitution itself, to the recovery of moneys paid pursuant to tax legislation held to be invalid. The reasoning advanced in support of that right is that (1) the Supreme Court of Canada has held that such a right is to be implied in that country's constitution;[24] (2) the implied

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[23] *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 776 (Starke J); see also at 754, 757-758 (Latham CJ, with Rich and McTiernan JJ agreeing). In relation to joint Commonwealth–State action to achieve an object, see also *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 552 (Gibbs CJ, with Murphy, Wilson and Dawson JJ relevantly agreeing), 563 (Mason J), 580 (Brennan J), 589 (Deane J).

[24] *Kingstreet Investments Ltd v New Brunswick* [2007] 1 SCR 3.

right was based on the "fundamental principle" of "no taxation without representation"; and (3) the same "principle" is "reflected in" the Commonwealth Constitution (**PS [62]**). The plaintiff's contention must be rejected.

33. *First*, any constitutional implication must be "securely based" in the text and structure of the Constitution.[25] The observation that the theme of "no taxation without representation" influenced the drafting of the Constitution or the inclusion of certain provisions provides no adequate basis for concluding that the Constitution gives effect to such a "principle" by impliedly conferring a personal right to recovery of moneys paid pursuant to invalid legislation.

10 34. *Second*, the plaintiff's submission does not engage with the consistent recognition that the Constitution is concerned with "the powers and functions of government and the restraints upon their exercise",[26] and the disavowal of the proposition that it confers causes of action or remedial rights akin to those developed in private law. The existence of a constitutional cause of action sounding in damages for breach of a constitutional prohibition was rejected in *Kruger v Commonwealth* (***Kruger***).[27] As Gummow J there observed, it does not necessarily follow from the existence of a restraint on legislative power that the restraint confers a right to "substantive relief upon a personal cause of action".[28] That the reasoning in *Kruger* was concerned with a postulated action for damages, rather than restitutionary relief, does not detract from the force of that

20 observation in the present context. In *British American Tobacco Australia Ltd v Western Australia* (***British American Tobacco***), three members of this Court referred to *Kruger* and observed that, while an action for moneys had and received against a State with respect to an invalid excise may be a matter arising under the Constitution for the purposes of s 76(i), it did not follow that the liability sprang "without more from s 90 of the Constitution".[29]

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25 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (***Australian Capital Television***) at 134-135 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453-454 [389] (Hayne J).

26 *James v Commonwealth* (1939) 62 CLR 339 at 362 (Dixon J), quoted in *Kruger v Commonwealth* (1997) 190 CLR 1 at 46 (Brennan CJ). See also *Mason v New South Wales* (1959) 102 CLR 108 (***Mason***) at 116 (Dixon CJ).

27 (1997) 190 CLR 1 at 46-47 (Brennan CJ), 93 (Toohey J), 124-126 (Gaudron J), 146-148 (Gummow J).

28 *Kruger* (1997) 190 CLR 1 at 147.

29 (2003) 217 CLR 30 at 52 [40] (McHugh, Gummow and Hayne JJ).

35. *Third*, to the extent that the asserted "warrant" for a constitutional right to recovery (**PS [62]**) depends on the proposition that such a right is necessary — in the sense relevant to constitutional implications[30] — that should also be rejected. Even apart from the plaintiff's contentions seeking the recognition of what it describes as "the *Woolwich* principle" as a basis for restitution, established causes of action under the general law, for which restitution is an available remedy, are capable of responding where moneys are exacted pursuant to an invalid law.[31]

D.2 Restitution at common law

36. As has just been noted, general law causes of action may furnish rights to recovery in circumstances where payments were made pursuant to invalid tax legislation. The plaintiff invokes duress *colore officii*, which may provide an avenue for restitution in an appropriate case. However, to essay an analysis of how duress would apply here would be distinctly artificial, in circumstances where the plaintiff has identified no relevant official demand for the payment of moneys from the plaintiff which would engage the principle (**cf PS [68]**).[32]

37. With respect to the reasoning of the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners* (***Woolwich***),[33] what the plaintiff describes as "the *Woolwich* principle" has not been adopted as a part of the Australian common law. It suffices to observe that any such principle would be susceptible to defences at common law, and subject to any applicable legislative measures that may limit recovery, provide defences to the liability of a government or otherwise prescribe procedures for challenging assessments and recovering payments. In that respect, the necessity for and legitimacy of legislated limits on the recovery of payments was acknowledged in

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30 See *Australian Capital Television* (1992) 177 CLR 106 at 135 (Mason CJ).

31 See *British American Tobacco* (2003) 217 CLR 30 at 52-53 [42]-[43] (McHugh, Gummow and Hayne JJ). See also *Airservices* (2000) 202 CLR 133 at 259 [367] (Gummow J). Cf *Kruger* (1997) 190 CLR 1 at 148 (Gummow J), referring to *Federal Deposit Insurance Corporation v Meyer* 510 US 471 at 485 (1994), where it was said that a cause of action against federal officials, sounding in damages, was implied in part because no other action was available. See also *Bivens v Six Unknown Federal Narcotics Agents* 403 US 388 at 410 (1971).

32 See *Mason* (1959) 102 CLR 108. The identification of an official demand is one element that distinguishes duress *colore officii* from the novel basis for relief identified in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70: see *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337 at 374 [79] (Lord Walker), 408-409 [173]-[174] (Lord Sumption) (with Lord Hope, Lord Clarke and Lord Reed relevantly agreeing).

33 [1993] AC 70.

Woolwich itself,[34] and similar considerations have been acknowledged in Australia in connection with common law actions against the revenue.[35]

PART V: ESTIMATE OF TIME

38. It is estimated that the Attorney-General for the State of Victoria will require up to 15 minutes for the presentation of oral argument.

Dated: 12 December 2022

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34 [1993] AC 70 at 174, 176 (Lord Goff), 200 (Lord Slynn).

35 *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 68 (Mason CJ). See also *Thiess v Collector of Customs* (2014) 250 CLR 664 at 673-674 [31]-[32] (the Court), referring to *Sargood Bros v Commonwealth* (1910) 11 CLR 258 at 301-303 (Isaacs J).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S202 of 2021

BETWEEN:

HORNSBY SHIRE COUNCIL
Plaintiff

and

10

COMMONWEALTH OF AUSTRALIA
First Defendant

STATE OF NEW SOUTH WALES
Second Defendant

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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

No.	Description	Version	Provisions
Constitutional provisions			
1.	*Commonwealth Constitution*	Current	ss 51(xxxi), 55, 76(i), 90, 96 and 114
Statutory provisions			
2.	*A New Tax System (Goods and Services Tax Imposition—Customs) Act 1999* (Cth)	Current (1 July 2005 to date [C2005C00389])	s 5
3.	*A New Tax System (Goods and Services Tax Imposition—Excise) Act 1999* (Cth)	Current (1 July 2005 to date [C200500390])	s 5
4.	*A New Tax System (Goods and Services Tax Imposition—General) Act 1999* (Cth)	Current (1 July 2005 to date [C2005C00391])	s 5
5.	*Federal Financial Relations Act 2009* (Cth)	Current (1 October 2020 to date Compilation No. 11 [C2020C00327])	ss 5(1), 6(2) and 6(3)(a)(ii) and (c)

6.	*Intergovernmental Agreement Implementation (GST) Act 2000* (NSW)	Current (6 July 2004 to date)	ss 3(1), 4(2), 5 and Schedule 1
7.	*Local Government (Financial Assistance) Act 1995* (Cth)	Current (10 March 2016 to date Compilation No. 8 [C2016C00566])	ss 4(2), 6(8), 11, 12, 13, 14, 15