


GSTR 2006/5A1 - Addendum - Goods and services tax: meaning of 'Commonwealth, a State or a Territory'

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Addendum

Goods and Services Tax Ruling

Goods and services tax: meaning of 'Commonwealth, a State or a Territory'

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Ruling GSTR 2006/5 to explain that, in some cases, a local government may be a State or Territory for the purposes of various provisions of the *New Tax System (Goods and Services Tax) Act 1999* (GST Act) listed at paragraph 1 of the Ruling.

GSTR 2006/5 is amended as follows:

1. Paragraph 4

- (a) Omit the second and third sentence of the paragraph.
- (b) Insert:

4A. The Addendum to this Ruling that issued on 28 March 2012 explains the Commissioner's view of the law as it applied before and after its date of issue. You can rely on this Addendum from its date of issue (28 March 2012) for the purposes of section 357-60 of Schedule 1 to the *Taxation Administration Act 1953*.

2. Footnote 2

Omit 'section 37'; substitute 'section 41'.

3. Paragraphs 13, 14 and 15

Omit the paragraphs; substitute:

13. Local governments may be a State or Territory. As is the case for corporations, the Commissioner considers that the principles developed by the High Court of Australia in cases concerning the meaning of 'a State' in section 114 of the Constitution, as described at paragraphs 8 to 12 of this Ruling, also apply in determining whether a particular local government is a 'State' or 'Territory' for the purposes of the GST Act.

14. There have been several cases in which the Courts have considered whether a local government is a 'State' for the purposes of section 114 of the Constitution.

15. In *The Municipal Council of Sydney v. The Commonwealth*²³ (*Municipal Council of Sydney*), in three separate judgements, all judges of the High Court agreed that the Municipal Council of Sydney was the 'State' for the purposes of section 114 of the Constitution. The power delegated to the Council, by State legislation, which allowed the Council to levy rates, was the determinative factor in that case.

15A. In *Deputy Commissioner of Taxation v. State Bank of New South Wales*,²⁴ the High Court referred to the *Municipal Council of Sydney* decision and said:

Indeed, the decision in *Sydney Municipal Council v The Commonwealth* is direct authority for the proposition that a corporation exercising governmental functions is 'a State' for the purposes of section 114.

15B. The Full Federal Court's decision in *Greater Dandenong City Council v. Australian Municipal, Administrative, Clerical and Services Union*²⁵ (*Dandenong City Council*) is another instance where a local government was considered to be a 'State' for the purposes of section 114 of the Constitution, albeit that it was the constitutional immunity under paragraph 51(xxxv) of the Constitution that was the key focus of that case. In his judgement, Finkelstein J referred to the *Municipal Council of Sydney* decision and considered several aspects of the statute under which the Council was established in reaching the conclusion that the Council was a 'mere instrumentality of the State'.²⁶

15C. The *Municipal Council of Sydney* decision and the *Dandenong City Council* decision both turned upon the specific features of the particular Councils involved; those specific features being bestowed upon them by State legislation.

15D. These decisions demonstrate that the legislation constituting a particular local government must be considered to determine whether it is a State for the purposes of section 114 of the Constitution. These decisions do not stand for a general proposition that local governments are a State for the purposes of section 114 of the Constitution.

²³ (1904) 1 CLR 208; (1904)10 ALR (CN) 29.

²⁴ (1992) 174 CLR 219 at 233.

²⁵ [2001] FCA 349; 112 FCR 232; 184 ALR 641.

²⁶ [2001] FCA 349 at 226.

15E. The decisions in *Municipal Council of Sydney* and *Dandenong City Council* are contrasted with decisions where the Court has determined that local governments do not operate as instrumentalities of a State or Territory Crown, and therefore are not considered to have the immunities of the Crown.²⁷ However, the principles for determining whether an agency or instrumentality represents the 'Crown' and has been endowed with the privileges and immunities of the 'Crown' for a particular purpose are different to the principles applied to determine whether a body is a 'State' for the purposes of section 114 of the Constitution.²⁸ Therefore, a local government that does not share the immunities of the Crown may, nevertheless, be the State for the purposes of section 114 of the Constitution and may, similarly, be the State or Territory for the purposes of the GST Act.

4. Related Rulings/Determinations

Omit 'GSTR 1999/1'.

5. Legislative references

Insert:

- Commonwealth of Australia Constitution Act 51(xxxv)

6. Case References

Insert:

- Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union [2001] FCA 349; 112 FCR 232; 184 ALR 641.
- The Municipal Council of Sydney v The Commonwealth (1904) 1 CLR 208; (1904) 10 ALR (CN) 29.

Commissioner of Taxation

28 March 2012

ATO references

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²⁷ See *Federated Municipal and Shire Council Employees Union of Australia v. The Lord Mayor, Aldermen, Councillors and Citizens of the City of Melbourne* (1918-19) 26 CLR 508; *Sydney City Council v. Reid* (1994) 34 NSWLR 506; *Bodney v. Westralia Airports Corporation Pty Ltd* (2000) 180 ALR 91 at 103-4; *Townsend v. Waverley Council* [2001] NSWSC 384.

²⁸ See *Deputy Commissioner of Taxation v. State Bank of New South Wales* (1992) 174 CLR 219; 92 ATC 4079; 23 ATR 1.