



THE COMMISSIONER OF TAXATION  
OF THE COMMONWEALTH OF  
AUSTRALIA

Appellant

THOMAS NOMINEES PTY LTD  
ACN 010 049 788

Respondent

APPELLANT'S SUBMISSIONS  
(2009 YEAR)

Part I: Certification

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

Part II: Issues arising

2. The same primary issue arises in this, and each of the four appeals, namely as set out at [2] of the Commissioner's submissions in appeal B60 of 2017 (**Thomas Primary Tax**).
3. That is because of the way in which the Full Federal Court addressed the four proceedings. Again for convenience, the four related appeals concern:
  - (a) *Martin Andrew Thomas v Commissioner of Taxation* (QUD 72/2016), in which Mr Thomas appealed from the orders of Greenwood J in respect to his liability for primary tax for the 2006 to 2009 tax years. The Commissioner cross-appealed in respect of Mr Thomas' net income in 2006, 2007 and 2008 (now B60/2017);
  - (b) *Martin Andrew Pty Ltd v Commissioner of Taxation* (QUD 78/2016), in which MAPL appealed from the orders of Greenwood J in respect of the 2008 tax year. The Commissioner cross-appealed in respect of net income in 2008 (now B61/2017) (**MAPL Primary Tax**);
  - (c) *Commissioner of Taxation v Thomas Nominees Pty Ltd* (QUD 79/2016), in which

the Commissioner appealed in respect of Greenwood J's construction of s101 of the 1936 Act, or in his application of it contrary to evidence in respect of Mr Thomas' entitlement to a share of the income of the trust estate in 2009. Thomas Nominees filed a Notice of Contention in support of the trial judge's conclusions (now B62/2017) (**2009 Year**);

- 10 (d) *Commissioner of Taxation v Martin Andrew Thomas* (QUD 80/2016), in which the Commissioner appealed against Greenwood J's determination that Mr Thomas was not liable to an administrative penalty in respect of each of the income years 2006 to 2009 (now B63/2017) (**Thomas Penalty**).

### **Part III: Certificate regarding s 78B Judiciary Act 1903**

- 20 4. The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and has determined that notice is not required.

### **Part IV: Reports and authorised reports citations**

5. *Thomas v The Commissioner of Taxation* [2015] FCA 968.
6. *Thomas v The Commissioner of Taxation* [2017] FCAFC 57.
- 30 7. In the particular circumstances, *Thomas Nominees Pty Ltd v Thomas* (2010) [2010] QSC 417; 80 ATR 828.

### **Part V: Narrative of relevant facts found or admitted**

8. The Appellant repeats the narrative of relevant facts set out in his submissions in appeal B60/2017 at [9] to [30].

### **Part VI: Argument**

#### 1. The principal issue

- 40 9. Pagone J treated the several proceedings, and the reasons for the final orders, as turning on the one issue. He was of the view at FCAFC [7] that "the principal issue in these appeals is whether the taxpayers are entitled to franking credits in the relevant income tax years. Other issues concerning penalty assessments also arise if the taxpayers are unsuccessful on the principal issue." In that regard, Pagone J's reasons at FCAFC [7]-
- 50 [22] dealt with the statutory context and facts, in particular franking credits under Division 207; paragraph [23] commenced with the "necessity" of considering whether

the operation of Division 207 was affected by the orders of Applegarth J, with such consideration following at [23]-[27]; provided further consideration in respect of the 2009 Year proceeding at [28]-[29]; and concluded that because of his conclusions on the Declaration and *Executor Trustee*, it was unnecessary to consider the question of penalties at [30].

- 10
10. The principal issue has been described in the Thomas Primary Tax submissions at [2].
11. The Appellant repeats the submissions made in appeal B 60/2017, which, relevantly for the purposes of this appeal, address: the relevant legislative context; the application and reach of *Executor Trustee*; the proceedings in the Supreme Court of Queensland; and the correct disposition of the tax issues. Those matters are sufficient to dispose of this appeal.

## 2. Errors in the reasons of Pagone J concerning the 2009 income year

20

12. Pagone J approached the 2009 income year in the same way as he did the 2006 to 2008 income years, “albeit with reluctance”,<sup>1</sup> having found that the Trustee’s resolutions for the 2009 year were “plainly made upon the same misguided understanding of how Division 207 operated”.<sup>2</sup>

30

13. For the purposes of the 2009 income year, Pagone J proceeded on the basis that he was bound by paragraph (1)(b)(iii) of the Declaration; and then treated the Franking Credit Resolutions as determinative of each Beneficiary’s proportionate share of the distributable income of the Trust; i.e., such proportionate shares as facilitated an allocation of franking credits to each Beneficiary in the amounts disclosed in the Franking Credit Distribution Resolutions, reasoning that “the terms of the two resolutions only make sense if construed” as such.<sup>3</sup>

40

14. Thus, in effect, Pagone J sought to reverse engineer from the Franking Credit Resolutions to achieve the proportionality between franked distributions and franking credits that is required by Division 207. That approach at least subordinates the Net Income Resolutions to the operation of the Franking Credit Resolutions, if not ignores the Net Income Resolutions.

15. To that end, just as he did for the 2006 to 2008 income years, for the 2009 year Pagone J

50

---

<sup>1</sup> FCAFC [29].

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

held that paragraph 1(b)(iii) of the Declaration could, taken in isolation, bind a court in subsequent tax proceedings; in particular, it could be given effect in isolation from both paragraph 1(a) of the Declaration, which he considered to be erroneous,<sup>4</sup> and paragraph 1(b)(iv) of the Declaration, which paragraphs, read together, reflect Applegarth J's reasoning by giving effect to the Bifurcation Assumption.

- 10 16. The monetary result found by Pagone J to apply in respect of the 2009 income year was not, and could not, be reached by construing the Resolutions in that way. Nor was that result consistent with the Bifurcation Assumption reflected in the Respondents' income tax returns and, at least implicitly, approved by Applegarth J.
- 20 17. Instead, inasmuch as Pagone J described his conclusion on the 2009 income year as being "consistent with the intention of the trustee reflected in the mind of the person drafting the resolutions",<sup>5</sup> he relied upon evidence of the subjective intention of Elizabeth Abbott as the drafter of the Resolutions in order to ascertain what she thought the Resolutions achieved,<sup>6</sup> akin to the analysis appropriate to a rectification suit (which, for the reasons given in the Commissioner's submissions in Thomas Primary Tax at [87], would not assist in any event).

### 3. Disposition

- 30 18. If the Commissioner succeeds on grounds 2 and 3 of his notice of appeal in each appeal, that matter ought be remitted to the Full Federal Court for determination.

### **Part VII: Statutes**

19. The relevant statutes are set out in the annexure to the Thomas Primary Tax submissions (B60/2017).

### **Part VIII: Orders**

- 40 20. The appeal be allowed, with costs.
21. The proceeding be remitted to the Full Federal Court for determination according to law.

### **Part IX: Estimate**

22. The estimated time required for oral argument of the appellant in this matter is included

50

---

<sup>4</sup> FCAFC [21] and [22].

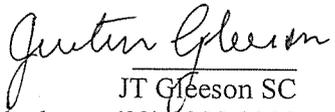
<sup>5</sup> FCAFC [29].

<sup>6</sup> Evidence which Pagone J considered at FCAFC [20] and [21].

in the estimate of time in the Commissioner's submissions in Thomas Primary Tax  
(B60/2017).

Dated: 24 November 2017

10

  
JT Gleeson SC  
Telephone: (02) 8239 0200  
Email: [justin.gleeson@banco.net.au](mailto:justin.gleeson@banco.net.au)

PA Looney QC  
Telephone: (07) 3236 3369  
Email: [philiplooney@qldbar.asn.au](mailto:philiplooney@qldbar.asn.au)

20

  
JA Watson  
Telephone: (02) 8239 0248  
Email: [watson@banco.net.au](mailto:watson@banco.net.au)

30

CM Pierce  
Telephone: (03) 9225 6235  
Email: [cpierce@vicbar.com](mailto:cpierce@vicbar.com)

Counsel for the Appellant

40

50