



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

AGRINOVA PTY LTD ACN 629 285 589

Applicant

and

CHIEF COMMISSIONER OF STATE REVENUE (NSW)

First Respondent

NEW SOUTH WALES CIVIL AND ADMINISTRATIVE TRIBUNAL

Second Respondent

APPLICANT'S SUBMISSIONS IN REPLY

PART I FORM OF SUBMISSIONS

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

PART II REPLY

A SECTION 90(1)(a) IS ENGAGED BY THE *DUTIES ACT*

2. The Commissioner submits (for the first time) that the validity of s 90(1)(a) does not arise because it “did not purport to immunise the transfers of land” to Agrinova, which were the object of the *Duties Act 1997* (NSW), as distinct from the instruments which effected them: **RS [17]-[22], [58]; Qld [4]; SA [4]**. The submission should be rejected: ss 8, 11 and 12 of the *Duties Act*, by imposing duty on the transfers of land, would, within the meaning of s 90(1)(a), “subject to ... duty” the instruments effecting those transfers.

3. “Subject to” is a relational phrase of intrinsic breadth encompassing any practical burden. It denotes a relationship broader than the precise legal incidence of a duty or charge. The purpose of s 90 is to minimise the expense of divorce “by removing liability to stamp duty”: **RS [18]**, quoting *Bryan* (1989) 20 ATR 868 at 870; **AS [55]-[56], Cth [9]-[11], [51]**. All five justices in *Gazzo* implicitly recognised the central concern of s 90(1)(a) as the exemption from duty of transfers, not merely instruments effecting them: 230 (Gibbs CJ), 248-251 (Mason J), 256, 260-261 (Murphy J), 269, 271 (Aickin J), 280 (Stephen J); **Vic [15], [44]; cf RS [18]**.

4. The statutory purpose would be defeated by a construction of the text so narrow as to permit States to avoid the rule by mere drafting technique. Instead, s 90 should be construed recognising that it is designed to meet different possible taxing events in different States at different times. Section 90(1)(a) is thus concerned with duties and charges which, in substance and practical effect, burden relevant instruments, not with whether State law selects the instruments as the formal legal criterion for the incidence of the duty or charge.

5. When s 90 was enacted (both before and after *Gazzo*), stamp duties were imposed “upon vellum, parchment and paper”, being the means by which a transfer was effected: *Benidorm* (2020) 104 NSWLR 232 at [46]-[47]. There has since been “a shift in emphasis” to impose duty on transactions: *ALH Group* (2012) 245 CLR 338 at [8]. But the *Duties Act* was explained on the second reading of its Bill as “continu[ing] to impose duty on dutiable transactions”: NSW Legislative Assembly, *Hansard*, 12 November 1997 at 1612. And it continues practically to burden instruments. Liability for duty arises when the instrument, if there be one (s 10), is first executed (s 12(2)); if there is no instrument, a transferee must generate a written statement in

an approved form (s 15); and instruments, including such written statements, must be “lodged” with the Chief Commissioner (s 16) and are to be stamped (s 288), with the stamping to operate as an assessment of the duty payable (s 297). An outstanding duty liability prevents use of an instrument (ss 301, 304, 307); the practical efficacy of the instrument is thus burdened by the imposition of duty on the transaction it effects or evidences.

B GAZZO SHOULD BE REOPENED

6. The case for re-opening *Gazzo* is not merely the contestability of the majority conclusion on a matter of characterisation on which reasonable minds may differ: **RS [24]; Qld [9]**. The submissions in that respect wrongly gloss over the errors of principle in the majority reasoning (as though to justify afresh, and on different grounds properly to be argued having re-opened the precedent, the contestable conclusion reached).

7. The submissions gloss over the “close connexion” test, which cannot sensibly be read as equivalent to a “sufficient connection” test or set aside as mere “semantics” (**RS [30]**); this was an express point of difference between the majority and minority: at 248 (Mason J), 255 (Murphy J). The other verbal formulae of the majority justices emphasised in **Qld [12]**—referring not only to “close” but also to “sufficient” and “remote” connections—are nonetheless coloured by the overarching relevance given to whether there was a “close” connection. The submissions also gloss over the undue weight given by the majority to perceived areas of State constitutional competence as being relevant to the character of the Commonwealth law, and not only in the implied incidental power: **AS [66]-[67]; Cth [43]**.

8. *Gazzo* has “come increasingly to appear as an outlier in the stream of authority”, and has been “weakened” by subsequent decisions: *NZYQ* (2023) 280 CLR 137 at [35]; **AS [64]-[68]; Cth [36]-[41]**. Neither the holding nor the dispositive reasoning has been endorsed or applied by any authority of this Court. Reopening would properly reflect an “evolving understanding of the Constitution” (*NZYQ* at [35]), and be consistent with the “strongly conservative cautionary principle”: **AS [63]; cf RS [23], Qld [7]**.

9. **Qld [17]-[19]** misunderstands the argument actually made at **AS [71]**. Section 424 of the *Duties Act 2001* (Qld) is not a “concession” of the validity of s 90; it is an indication that Queensland has not “relied” on *Gazzo* in legislating to reverse, in part, the decision.

C SECTION 90 IS A VALID LAW OF THE COMMONWEALTH

10. *Breadth of s 90(1)(a) not beyond power*: **RS [40], [42], Vic [38]-[43] and Qld [21]** downplay the significance of s 90(1)(a) being parasitic on an order under Pt VIII. Submissions

directed to the breadth of orders capable of being made (RS [47], Vic [8]-[12]) are a distraction, because there is no challenge to those powers. Rights created under them are “created by virtue of the exercise of a judicial discretion which necessarily takes account of considerations arising out of the marital relationship”: *Fisher* (1986) 161 CLR 438 at 453; AS [51]. Section 90(1)(a) does not involve a “further and separate step” beyond constitutional limits: Vic [29]. It spells out an incident of an order itself dealing with, and operating upon, the marital relationship. That provides sufficient “calibration” to s 51(xxi) and (xxii): AS [60]; cf Vic [40]-[43].

11. The spectre of orders that are a “contrivance” (RS [33]), implausible (RS [42]), or remote to the parties (eg RS [54]) ignores the constraints on power under Pt VIII, and that the transfers in this case did affect the ex-husband’s interests both as a beneficiary and as the party required to make a cash payment calculated by reference to the value of real property he wished to retain: AS [9]; RS [51]; see also Cth [93]. RS [40] and Vic [26]-[27], [31] raise questions of construction of the phrase “for the purposes of” in s 90(1)(a) which do not arise in this case.

12. Application to “invalid” orders: Similarly, submissions that s 90(1)(a) applies to orders “irrespective of their validity” (RS [45]) or which are “invalidly made” (RS [46]-[47]) ignore that orders under Pt VIII are valid until set aside: AS [78]. In “any developed legal system”, “[t]here must come a point” where “decisions made in the exercise of judicial power are given effect despite the particular decision later being set aside or reversed”: *Kable* (2013) 252 CLR 118 at [38]. Section 90(1)(a) reflects a legitimate legislative choice as to that point in time. The assertion (RS [45]) that the Commissioner might properly be heard on whether orders should be made or set aside is unexplained. That an order has legal consequences for the creation of a tax liability does not give the Commissioner an interest justifying intervention in Pt VIII proceedings (unlike where he is a creditor and an order might impact the debtor’s ability to satisfy the debt). No relevant “interest” arises merely from the Commissioner’s role in administering the law: ss 79(10), 79A, 92(1).

13. Characterisation of s 90(1)(a): The Commissioner (RS [38]) and interveners (Vic [26], [28]; Qld [22]) contend that s 90(1)(a) lacks sufficient connection to s 51(xxi) or (xxii) because it “destroys” liabilities under State laws which have “no necessary connection” with the marriage. The generality of the affected State law does not deny the character of the Commonwealth law, when the immunity it enacts is directed to specific applications of the general State law. *G Global* (2025) 99 ALJR 1465 at [112] is not on point: cf Vic [32]. That was about whether a Commonwealth law, the effect of which was to revive a State law, was with respect to an acquisition of property, so that potential character of the Commonwealth law

could not be understood otherwise than by reference to the character of the State law.

14. *Facilitating compliance with Pt VIII orders:* Submissions as to the effects of duty on the “operation and practical efficacy” of Pt VIII orders (AS [59]) reveal that the States apply, in substance, a “close connexion” test which led members of the majority in *Gazzo* into error: AS [64]; Cth [34]. The Commissioner suggests that immunisation from liability, to be valid, would have to confer benefit on both marital parties: RS [50]-[51]. Putting aside that lowering the costs of divorce addresses a barrier to divorce which does affect both parties (AS [54]-[56]), the submission is out of step with authority: *Commonwealth v ACT* (2013) 250 CLR 441 at [34]. The Victorian Attorney-General then suggests that duty would have to be prohibitive to compliance with orders in most or all cases: Vic [45]-[46]. That is too high a threshold. In any event, the duty and interest at issue in this case was almost equal to the value of the order for payment to the ex-wife: AS [5], [12]. The effect on the “practical efficacy” of the orders is considerably more than “slight”: cf Vic [44]-[47]; RS [51].

15. *Impact on State power and scheme:* In *Bayside* (2004) 216 CLR 595, the Court observed that a law “conferring upon carriers an immunity from all State taxes and charges” would bear a “direct and substantial connection” with the power, just as would a law (as in that case) conferring an immunity from some (namely, discriminatory) State taxes and charges: at [27], [30]; cf RS [39], Vic [60]-[64]. That reflects that the imposition of State tax can meaningfully burden a matter within Commonwealth power, and that Commonwealth powers are ample enough to alleviate such burdens (subject to *Melbourne Corporation*): AS [56], [67]; Cth [42].

16. The reality of non-exclusive Commonwealth power is that whether there is any “invasion” of State power or undue “modification” of a State scheme must turn on matters of degree. Unlike the law held invalid in the *Second Uniform Tax Case* (1957) 99 CLR 575 (cf Vic [56]-[59]), which affected the payment of State income tax by every taxpayer (see 613, 660) and made the imposition of State income tax wholly impracticable (see 624, 643, 648), s 90 leaves the States’ general power to tax interests in land wholly untouched, and leaves untouched even transfers of land outside of the narrow class exempted by it: AS [60]. The character of s 90 derives from its focused application to transactions occurring because of Family Court orders, not from any sweeping attack upon State taxation. In *Royal Metals* (1923) 33 CLR 1, Parliament was unable to “insist upon the State registration of its title” to acquired land because conditions on registration did not “prevent or interfere” with the Commonwealth’s ability to acquire land: at 28. That does not translate to s 90(1)(a) and the powers in s 51(xxii) and (xxiii) because the State conditions, if left unalleviated, would interfere with the

performance of the duties created by the Family Court’s orders: cf **Vic [66]**. Further, s 90(1)(a) does not purport to excuse compliance with any preconditions to registration other than duty, and so does not “impair” or “modify” the State scheme in any meaningful sense.

17. No application to Commonwealth laws: It is immaterial to the analysis that s 90(1)(a) does not apply to Commonwealth laws of general application: cf **RS [49]**, **Vic [48]-[51]**. It is targeted to laws which could undermine “uniformity” in the law of divorce throughout the Commonwealth: **AS [56]**; *Commonwealth v ACT* (2013) 250 CLR 441 at [7]. The law shields Commonwealth orders from external, uncontrolled imposts by ensuring, through s 109 of the Constitution, that the States could not impose particularly burdensome duties, over and above “relatively modest” ones: cf **Vic [44]**. That risk—which even Gibbs CJ acknowledged in *Gazzo* (at 239)—does not arise in respect of taxes that the Commonwealth itself imposes. Further, capital gains tax (cf **Vic [48]**) is not a tax on the transfer of land; it would be payable whenever the gains were realised and is not a transaction cost of the kind to which s 90 is directed. It is not comparable to State duties, which are incurred only because of a property settlement.

D MATERIALITY

18. The Commissioner advances two bases on which the Appeal Panel’s error is said not to have been material: **RS [58]**; cf **Vic [68]**. The *first* basis should be rejected, because s 90(1)(a) attaches to the duty charged in this case: Section A above. The *second* basis is also wrong, because s 90(1)(a) is wholly valid: **AS [34]-[61]**; Section C above. The error was material.

19. In relation to the reading down posited at **RS [54]**, “order” in s 90(1)(a) could be read as “valid order”, but the Commissioner does not grapple with the temporal significance of this point. His submission appears to result in a permanent contingent liability to duty depending on the possibility that an order is set aside at some indefinite future time. It would theoretically be possible to read down the powers to make orders under Pt VIII by reference to the subject-matters of marriage and divorce (howsoever delineated by the Court), with consequential effect on the scope of s 90, which is engaged by such an order. But no party or intervener suggests that those powers are not laws with respect to marriage or divorce.

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