



HIGH COURT OF AUSTRALIA

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Details of Filing

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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 OUTLINE OF ORAL ARGUMENT

PART I INTERNET PUBLICATION

1. This outline of oral argument is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Construction of s 90(1)(a) (AS [20]-[33]; AR [10]-[12])

2. Part VIII confers powers to make orders, in relation to property, spousal maintenance and maintenance agreements, which are hedged by express and implied limits ensuring that the rights and duties created arise out of the marital relationship.
3. Section 79 applies in “property settlement proceedings” (s 4). Such proceedings must arise in the jurisdiction conferred in relation to “matrimonial causes”, which is limited by circumstances arising out of the marital relationship (s 39; also s 4, paras (ca) and (e)).
4. Within those limits, s 79(1) confers very wide discretionary power to make orders altering the interests of the parties to the marriage in their property, including transfers otherwise than to a party to the marriage, and with no requirement that it be for the sole benefit of a party to the marriage: *Fisher v Fisher* (1986) 161 CLR 438 at 449, 454. The power nonetheless has application only with respect to circumstances arising out of the marital relationship: *Dougherty v Dougherty* (1987) 163 CLR 278 at 286, 299-300.
5. Section 80 confers additional powers directed to the implementation of primary orders, such as orders under s 79: *Davidson v Davidson* (1994) 117 FLR 335 at 348. *Ascot Investments* (1981) 148 CLR 337 (**JBA 3, Tab 30**) does not provide that s 80 can never authorise orders that affect third parties: at 355.
6. Section 90(1), by providing that certain instruments “are not subject to” certain duties:
 - (a) adopts practical language accommodating a variety of possible duties or charges, not tied to particular ways that States might draft their taxing legislation;
 - (b) captures laws which could apply non-uniformly throughout the Commonwealth, being State laws, and Commonwealth laws which apply only in the Territories;
 - (c) is limited expressly (paras (b)-(c)) or by the hedging guaranteed by Pt VIII (para (a)) to instruments which confer a benefit on a party to or child of the marriage; and
 - (d) fixes on instruments executed “for the purposes of” or “in accordance with” an order under Pt VIII, which confines its reach, consistent with the legislative purpose, to negating those duties or charges which are transaction costs of a Pt VIII settlement.

Section 90(1)(a) is a law with respect to marriage (AS [34]-[74]; AR [13]-[17])

7. The principles of characterisation which would apply in relation to s 90(1)(a), if the question is reached, are well-settled: *Spence* (2019) 268 CLR 355 (**JBA 5, Tab 49**).

8. ***Core of the marriage power***: Marriage, within the meaning of s 51(xxi), refers to the entire relationship of marriage. The core conception of marriage includes the financial transaction costs associated with achieving under ss 79 and 80 a settlement of property interests consequent on the breakdown of the relationship, and the regulation thereof. That forms part of a broader topic of barriers to separation, the lowering of which is reflected in the vision of marriage—as a relationship that should be able to be brought to an end simply, inexpensively and with dignity—which underpins the *Family Law Act 1975* (Cth).

9. Section 90(1)(a) is thus a law with respect to marriage without further analysis, because its legal operation is upon the subject-matter of marriage properly construed. That includes the section’s operation in relation to a transfer to a family company, or in relation to non-marital property ordered to be transferred as an incident of implementing a settlement: in all cases, duty is a transaction cost of the court-ordered settlement, capable of negation by federal law.

10. ***Periphery of the marriage power***: If necessary, s 90(1)(a) is also appropriate and adapted to achieve its purpose of lowering transaction costs of a property settlement consequent on marital separation. It does not reach duties that do not fall as a transaction cost of the settlement, because it attaches only to instruments executed “in accordance with” or “for the purposes” of an order and thus where a specific transfer is part of the ordered settlement. That CGT is not negated does not bespeak discrimination, because CGT is not a transaction cost but a tax on gains. That some transaction costs (such as legal fees) are not negated does not deny the purpose of substantially lowering transaction costs, of which duty is a significant one.

11. There is no “invasion” of State power involved in negating State taxes on an activity that is within a Commonwealth head of power. Section 90 imposes no special burden on State taxation unconnected with the legitimate federal purpose of regulating the financial transaction costs of a court-ordered property settlement: *Royal Metals Case* (1923) 33 CLR 1 (**JBA 3, Tab 35**); *Second Uniform Tax Case* (1957) 99 CLR 575 (**JBA 7, Tab 55**); *Bayside City Council* (2004) 216 CLR 595 (**JBA 3, Tab 33**) at [30].

12. ***Re-opening***: *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 (**JBA 4, Tab 40**) should be reopened and overruled.

(a) *Gazzo* was argued and decided on a conception of incidental power that insufficiently appreciated the core of the power and s 90’s direct operation on marriage.

(b) The three majority judgments did not apply any principle carefully worked out in a succession of cases. They applied erroneous principles. There are relevant differences between them: 235ff (Gibbs J), 241ff (Stephen J), 261ff (Aickin J). The dissenting reasons of Mason J (247ff) and Murphy J (252ff) did not suffer those deficiencies and reflect a correct approach — not merely a preferable approach on some matter of degree.

(c) The majority’s references to requiring a “close connexion” with marriage were not grounded in authority, even at the time: *R v Lambert; Ex parte Plummer* (1980) 146 CLR 447 (**JBA 5, Tab 51**); *Russell v Russell* (1976) 134 CLR 495 (**JBA 4, Tab 48**); *Dowal v Murray* (1978) 143 CLR 410 (**JBA 3, Tab 37**).

(d) The holding has not produced any useful result. The States identify no relevant prejudice that would result from reopening.

The Appeal Panel’s error was material (AS [75]-[88]; AR [2]-[5], [18]-[19])

13. The orders made on 31 January 2019 (**SCB 121**) and 23 October 2019 (**SCB 134**) specified particular transfers to be made to a family company. Instruments of transfer were executed for the purposes of or in accordance with those orders (**SCB 28 [10]**), and squarely attracted s 90(1)(a). The Appeal Panel could realistically have reached a different result if it had applied s 90(1)(a); indeed it would have been obliged to reach a different result.

14. There is no warrant to read s 90(1)(a) as being engaged by some but not all orders under Pt VIII. Its connection with marriage is direct and does not depend on any further step beyond such connection as an underlying order necessarily has with marriage.

15. The Commissioner’s new argument, that s 90(1)(a) can be avoided by a State imposing duty on a transaction instead of an instrument, should be rejected. The language of “subject to” is of sufficient breadth to encompass any practical burden on instruments, irrespective of how the State chooses to define the precise incidence of the tax.

Date: 13 October 2026



Brendan Lim



Troy Rollo



Olivia Ronan