



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S21/2026
File Title: Agrinova Pty Ltd ACN 629 285 589 v. Chief Commissioner of
Registry: Sydney
Document filed: Form 27F - (AG-Cth) Outline of oral argument
Filing party: Interveners
Date filed: 13 Oct 2026

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

AGRINOVA PTY LTD
ACN 629 285 589
Applicant

CHIEF COMMISSIONER OF STATE REVENUE (NSW)
First Respondent

and

NEW SOUTH WALES CIVIL AND ADMINISTRATIVE TRIBUNAL
Second Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. ***Leave to re-open Gazzo***: The Commonwealth Attorney-General seeks to rely on her written submissions in respect of the grant of leave to re-open *Gazzo* (1981) 149 CLR 227 (**Vol 4, Tab 40**): **CS[25]-[46]**.
3. ***Construction of s 90(1)(a): CS[7]-[13]***: The proper approach to the constitutional characterisation of a provision requires considering the law in context, as part of any wider scheme of regulation, rather than in isolation: *Ravbar v Commonwealth* (2025) 99 ALJR 1000 at 1028-1029 [90] (Gordon J): **Vol 8, Tab 66**.
4. Section 90(1)(a) must be construed having regard to the purposes of the ***Family Law Act 1975*** (Cth), which, since enacted, has sought to ensure uniformity across Australian law in relation to the status and incidents of marriage and divorce; most relevantly here, in the economic aspects of those relations. The Family Law Act has done so in a manner that pursues several purposes, including the resolution of financial disputes as quickly, finally, and cheaply as possible: **CS[8]**. These purposes are evident in the legislative history, extrinsic materials, and provisions of the Act: Explanatory Memorandum, Family Law Amendment Bill 1983: **Vol 9, Tab 69**; Joint Select Committee Report of 1980: **Vol 9, Tab 72**; ss 79(2), 81 and 79A, *Family Law Act*: **Vol 1, Tab 4**.
5. The statutory context of s 90(1) indicates that it is only instruments having certain characteristics that attract the immunity from duty or charge. Each of the subsections in s 90(1)(a)-(c) contains words of limitation. In s 90(1)(a), those words of limitation are: (a) “executed by a person”; (b) “for the purposes of, or in accordance with”; and (c) “an order made under this Part”.
6. **“An order made under this Part”** is conveniently construed first, because s 90(1)(a) operates only in relation to orders made under Pt VIII, as expanded by Pt VIIIAA.
 - (a) Section 79(1) confers power to make orders in relation to the parties to a marriage or a bankruptcy trustee.
 - (b) Section 80(1)(d) confers power to make orders providing for execution of a deed or instrument “as are necessary to enable an order to be carried out effectively”.

- (c) Section 90AE confers a limited power to make orders in s 79 proceedings directed to and binding upon third parties to a marriage, to help separating couples achieve greater financial equity and certainty: Second Reading Speech, Family Law Amendment Bill 2003: **Vol 9, Tab 76**.
7. **“For the purposes of, or in accordance with”** requires a specific nexus between the Pt VIII order made in respect of the parties to a marriage/specified third party, and the instrument immune from duty/charge. The phrase uses a hendiadys-like formulation, which is to be read cumulatively, as a way of denoting the execution of an instrument “pursuant to” an order: Explanatory Memorandum, Family Law Amendment Bill 1983 (**Vol 9, Tab 69**). Only a person who is bound by a Pt VIII order (by being named in it) may execute an instrument pursuant to that order. A stranger to an order can take steps coincident with the order, but not pursuant to, for the purposes of, or in accordance with, it. Subsection (a) has an objective, and not subjective, criterion of operation.
 8. **“Executed by a person”** is to be read as meaning “executed by all persons” where the relevant instrument must be executed by multiple persons. The singular term “person” should be read as including the plural: s 23(b), *Acts Interpretation Act 1901* (Cth) (**AIA**). The constructional choice as to whether “a person” denotes “any” or “all” persons is resolved in favour of the “all” persons construction. The text and context support that construction, such that no contrary intention is disclosed for the purposes of s 2(2) of the AIA. A third party only avoids liability to pay any State duty or charge where they execute an instrument because they are bound by (through being named in) a Pt VIII order: cf **VS [27], RS [40]-[41]**.
 9. ***Relationship between operation of s 90(1)(a) and ss 51(xxi) and (xxii) of the Constitution***: The grants of power in s 51(xxi) (marriage) and 51(xxii) (divorce) are “cumulative” and overlapping, and each must be given its full scope and effect: *P v P* (1994) 181 CLR 583 at 600 (Mason CJ, Deane, Toohey, and Gaudron JJ): **Vol 4, Tab 45**. This accords with this Court’s most recent consideration of these powers in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (***Marriage Equality Case***): **Vol 3, Tab 34**. The purpose of the marriage and divorce powers was to confer on the Commonwealth Parliament broad powers to deal uniformly with marriage and divorce, being subjects of national importance; including by addressing proprietary interests subsidiary and consequential to them: *Marriage Equality Case* (2013) 250 CLR 441 at 453 [7], 461-462 [33]-[34] (the Court); Quick and Garran at p 723: **Vol 9, Tab 74**.

10. Section 90(1)(a) does not operate directly on the parties to a marriage. But the direct regulation of married parties does not reflect the outer limits of these cumulative grants of power. The provisions conferring power to make Pt VIII orders have a sufficient connection to the marriage and divorce powers. No party disputes this: **CS [53]**. Section 90(1)(a) then operates to protect the integrity and practical efficacy of those orders. The connection between s 90(1)(a) and those orders (and, thus, with the grants of power) is not “insubstantial, tenuous or distant”. *First*, s 90(1)(a) precludes State and Territory laws from interfering with courts’ fair adjustment of divorcing parties’ interests under Pt VIII orders, advancing the “maximum fairness” purpose of the *Family Law Act*. That any liability arising from the imposition of State duties or charges could be taken into account in making the order does not deny this purpose: cf **VS [50]**. The scope of any Commonwealth exclusion is a distraction: cf **RS [49]**, **VS [48]-[49]**. *Second*, s 90(1)(a) may alleviate financial burdens upon third parties bound by Pt VIII orders, which would otherwise frustrate the efficacy of such orders. *Third*, s 90(1)(a) promotes certainty for divorcing parties by preventing State duties and charges (differing by the location of the parties or their property) supervening at the conclusion of the bargain.
11. That a law destroys liabilities arising from generally applicable State laws does not preclude it from being a law “with respect to” a s 51 head of power: **CS [42]**. The starting point is that, if a law has a sufficient connection to a grant of Commonwealth power, it is irrelevant that it deals with a matter on which the States may also legislate: *New South Wales v Commonwealth* (2006) 229 CLR 1 at 73 [54], [142] (Gleeson CJ, Gummow, Hayne, Heydon, and Crennan JJ): **Vol 3, Tab 35**; *Bayside v Telstra* (2004) 216 CLR 595 at 624-625 [26]-[27] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon JJ): **Vol 3, Tab 33**.
12. Section 90(1)(a) is not analogous to the law in *Spence v Queensland* (2019) 268 CLR 355: **Vol 5, Tab 49**. The majority (Kiefel CJ, Bell, Gageler and Keane JJ) distinguished the impugned operation of that law from *Bayside*: [56], [73]-[74]. There is no “mere circumstance” between the immunity conferred by s 90(1)(a) and the subject matter of ss 51(xxi) and (xxii). This case is analogous with *Bayside*: cf **RS [39]**, **VS [61]**, **QS [16]**.

Dated: 12 October 2026



Ruth Higgins

Celia Winnett

Selena Bateman