



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL
FOR THE STATE OF VICTORIA (INTERVENING)**

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Section 90(1)(a) is insufficiently adapted to purposes that are within power

2. The moving parties submit that s 90(1)(a) is sufficiently connected to the marriage and divorce powers because, by reducing the costs consequent upon orders made under Pt VIII, it reduces barriers to divorce: **AS [55]-[56]; Cth [8]-[11], [49]; Reply [14]**.
3. A law which is protective of something within the subject matter of a head of power may yet not be a law with respect to that subject matter if it is insufficiently adapted to achieve that purpose: *Spence v Queensland* (2019) 268 CLR 355 at [62] (Kiefel CJ, Bell, Gageler and Keane JJ) (**JBA 5 / 49**). The validity of s 90(1)(a) thus depends on whether it is “fairly incidental” to a head of power. That is a question of degree: *Spence* at [65] (**JBA 5 / 49**), quoting the *Communist Party Case* (1951) 83 CLR 1 at 175 (Dixon CJ).
4. Section 90(1)(a) is insufficiently adapted to achieving the asserted purpose.

No limitation on the reach of s 90(1)(a)

5. First, s 90(1)(a) applies to “**any** duty or charge under **any** law of a State”, without qualification.
 - 5.1. Its application is not limited to duty payable by the parties to a marriage: cf *Family Law Act*, s 90(1)(b) and (c) (**JBA 1 / 4**); *Duties Act 2000* (Vic), s 44 (**JBA 2 / 13**).
 - 5.2. It is not limited to situations where the payment of duty would create some practical impediment to a Pt VIII order.
 - 5.3. It is not limited to duties or charges which target marriage or divorce. *Bayside* (2004) 216 CLR 595 at [30] (**JBA 3 / 33**) is distinguishable. The law in that case: (i) was within the “central conception” of the relevant head of power, not at its periphery; and (ii) was limited to discriminatory burdens: **Vic [60]-[63]; Spence** at [74] (**JBA 5 / 49**).

Section 90(1)(a) operates differentially between State and Commonwealth duties and charges

6. Second, s 90(1)(a) operates differentially without justification, because it targets State duties and charges without an equivalent exemption from Commonwealth duties and charges or Commonwealth taxes generally: **Vic [48]-[51]**.

- 6.1. For example, capital gains taxes may be just as much costs of a divorce as State duties on transfers of property.
- 6.2. The exclusion of State duties is not necessary to preserve the “economic balance struck by the Court” (**Cth [49]**) because the Court can and does take taxation consequences into account when making orders: **Vic [50]**; s 90AE(4)(a)-(b). Certainty as to the financial consequences of orders does not demonstrate a connection with the marriage or divorce powers: cf **Cth [51]**.

Section 90(1)(a) affects State legislative power

7. Third, in assessing whether a law is within the incidental scope of a head of power, it may be relevant to take into account the effect the law has on areas of State legislative competence: *Spence* at [62], [67]-[69], [80], [82] (**JBA 5 / 49**), approving *Gazzo* (1981) 149 CLR 227 at 240 (Gibbs CJ) (**JBA 4 / 40**) and quoting *Second Uniform Tax Case* (1957) 99 CLR 575 at 614-615 (Dixon CJ) (**JBA 7 / 55**); cf **Reply [16]**.
8. Section 90(1)(a) purports to remove an essential element of State land title registration systems (that is, payment of duty) on the basis that the payment of duty *might* inhibit an order: **Vic [45]-[46]**; cf *Spence* at [82]-[83] (**JBA 5 / 49**); see also **Vic [52]-[54]**.
9. The *Royal Metals Case* (1923) 33 CLR 1 at 54 (Isaacs J) (**JBA 3 / 35**) illustrates that a provision such as s 90(1)(a) requires close scrutiny: **Vic [65]-[66]**; cf **Reply [16]**.

Section 90(1)(a) is invalid in its application to State duties, unless it can be read down

10. Section 90(1)(a) is wholly invalid in its application to State duties and charges, unless it can be read down in the ways identified at **NSW [54]**; see also **Vic [41]**. To read it down in that way may impermissibly involve the Court in a legislative function: **Vic [68]**.

Date: 14 October 2026



Alistair Pound

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